No. 6038

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE BANKERS RESERVE LIFE COMPANY, a Corporation,
Appellant,

vs.

MARION E. YELLAND,
Appellee.

BRIEF FOR APPELLANT.

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I.

STATEMENT OF THE CASE.

This appeal is from a judgment entered on a verdict of the jury in an action lately pending in the United States District Court, in and for the District of Nevada, wherein the appellee, Marion E. Yelland, sued to recover from the appellant, Bankers Reserve Life Company, on a certain alleged contract of insurance on the life of her husband, Louis A. Yelland.

(a) THE BASIC FACTS.

The facts out of which the controversy arises are as follows:

On November 18, 1926, one F. L. Hickman, an agent of the appellant insurance company, accompanied by one B. H. Robison, called on Louis A. Yelland, at the latter's ranch in White Pine County, Nevada. B. H. Robison was one of Yelland's neighbors, and apparently accompanied Hickman on the visit to the Yelland ranch for the purpose of introducing him to Mr. Yelland. On that occasion the three men conversed together for a few minutes, and then went to Robison's home. The next day, November 19, 1926, Hickman returned alone, and went hunting with Yelland in the foothills, where the two spent the night, coming down to the ranch house for breakfast the next morning. That day, November 20, 1926, Yelland signed an application for insurance in the Bankers Reserve Life Company, and delivered it, together with his promissory note for the first annual premium, to Hickman. Shortly thereafter, and on the same day, Hickman left the Yelland ranch, taking the application and promissory note with him.

The application and note were mailed by Hickman to his office in Salt Lake City from Baker, Nevada. From there they were mailed to the home office of the Bankers Reserve Life Company, in Omaha, Nebraska, on November 26, 1926. That same day, November 26, 1926, Louis A. Yelland presented himself to Dr. M. J. Rand at Ely, Nevada, for the insurance company's medical examination. Dr. Rand's report of the medical examination, consisting

of the applicant's answers to the questions contained in the company's regular form, the doctor's own report of his examination of the applicant, and the doctor's confidential report, were all mailed to the home office of the Bankers Reserve Life Company in Omaha on November 26, 1926. The application and the doctor's report were received at appellant's home office on Monday, November 29, 1926.

On November 27, 1926, and before the application and medical report arrived at appellant's home office, Yelland sustained accidental injuries, from which he died the following day, November 28, 1926.

When the application and medical report arrived at appellant's home office on November 29, 1926, they were entered according to regular routine on the company's records, and were then laid aside to await the arrival of the answers to appellant's formal inquiry letters that had been sent out from Hickman's office; and also to await the arrival of a report from the Retail Credit Company, a mercantile reporting agency, which, pursuant to appellant's regular routine, had been employed to make an inspection and report on the Yelland application when it arrived at appellant's home office.

The formal inquiry letters had been mailed to the persons given by Yelland as references in his application for insurance, from Hickman's office in Salt Lake City, the same day the application had been forwarded to the appellant's home office, November 26, 1926.

The answers to two of the inquiry letters arrived at appellant's home office on December 3, 1926; and on that

same day the Retail Credit Company telegraphed to appellant that upon investigating the Yelland application they had found that he was dead.

No action having been taken on the Yelland application before receipt of the telegraphic report of Yelland's death, the appellant company, by order of its executive committee, rejected the application on December 3, 1926, and sent notice to Hickman that such action had been taken.

On December 10, 1926, Mr. W. G. Preston, Vice-President and Chairman of the Executive Committee of the Bankers Reserve Life Company, wrote to Hickman directing him to forward to the home office the Yelland promissory note, which had been retained by Hickman at the time the application was sent in. It does not appear just when Hickman mailed the note to appellant's home office, but apparently there was little or no delay, as Mr. Preston wrote on behalf of appellant to the appellee, Mrs. Marion E. Yelland, on December 20, 1926, stating that the company had rejected the application because of Mr. Yelland's death before it had been acted on in the course of the company's usual custom and routine; and in that letter, Mr. Preston returned the promissory note to Mrs. Yelland.

Some time subsequently, demand was made on the appellant for the payment of the accidental death value of the alleged contract of insurance; and in May, 1927, W. E. Billings, Esquire, attorney for Mrs. Yelland, made another demand on the company for the payment of the acci-

dental death value of the alleged contract of insurance, at the same time tendering the promissory note again to appellant. Both of these demands were refused by the appellant company, and in the reply to Mr. Billings appellant returned the promissory note, and it was thereafter retained by him or his client.

Later, this suit was instituted in the state courts of Nevada, on behalf of Mrs. Yelland, as beneficiary under the alleged contract of insurance, and thereafter removed to the District Court of the United States, for the District of Nevada.

(b) THE ULTIMATE PLEADINGS.

The case was tried before the court and a jury on the second cause of action stated in appellee's amended complaint (Tr. 1-9)*, the appellant's answer thereto (Tr. 12-42), and the appellee's amended reply to appellant's answer (Tr. 43-47).

The material allegations of these pleadings may be summarized as follows:

In Paragraph III of the amended complaint it is alleged that Hickman was, at material times, "the General Agent and Intermountain Manager" for appellant.

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*References in this brief to the Transcript of Record are to the pages of the printed Transcript where the particular matter appears. Where the reference contains a Roman numeral it means that the District Court made a ruling adverse to appellant on the matter referred to, and the Roman numeral indicates the particular assignment of error in which the ruling of the Court is raised in the formal Assignment of Errors. The Assignment of Errors appears on pages 282 to 340 of the printed Transcript of Record; the Additional Assignment of Errors appears on pages 347 and 348.

In Paragraph IV it is alleged that Hickman had adopted the "general practice and custom" of representing to actual and prospective patrons that, if they applied for insurance, it would be effective as soon as the application was signed, the first premium paid and the medical examination taken, if that medical examination showed the applicant to be a good risk for insurance; and that by reason of such practice and custom Hickman had procured many profitable contracts of insurance for appellant.

In Paragraph V it is alleged that on November 20, 1926, Hickman entered into a contract of insurance, *"partly oral and partly in writing"*,* with Louis A. Yelland, in the following manner: "The said Louis A. Yelland *signed a written application* of the said defendant company for insurance upon his life", which was delivered to and accepted by Hickman, together with Yelland's promissory note for the amount of the first annual premium; thereafter, on November 26, 1926, Yelland was examined by Dr. M. J. Rand, appellant's medical examiner, at Ely, Nevada, who "found and declared" that Yelland was in sound health and a good risk for insurance, and that a report of his "findings" was forwarded by Dr. Rand to the appellant "in the manner and form required" by appellant; and that Yelland had been *"induced"* to sign the application by Hickman's representation and promise that the insurance applied for in said application would be in full force and effect upon Yelland's signing the application, giving the promissory note, and taking the medical examination, if

*Unless otherwise indicated, italics in this brief are ours.

such examination showed him to be a good risk for insurance.

In Paragraph VI it is alleged that Yelland died on November 28, 1926, as a result of accidental injuries sustained by him the previous day.

In Paragraph VII it is alleged that Louis A. Yelland, before his death, and appellee, subsequently thereto and before filing suit, "performed all the things and conditions necessary to be performed on their part" to entitle appellee to collect the amount of said alleged contract of insurance.

In Paragraph VIII it is alleged that demand was made on appellant for the payment of said alleged contract of insurance, and that appellant refused to pay.

Appellant's answer denies that Hickman was either general agent or manager for appellant; and it further denies that appellant ever made or entered into any contract of insurance on Yelland's life.

Appellant's answer denies, on information and belief, that Hickman made a practice or custom of representing to actual or prospective patrons that insurance, if applied for, would become effective at the time, or under the conditions and circumstances, alleged in Paragraph IV of the amended complaint, or that Hickman had ever made any such representation to any actual or prospective patron.

Appellant's answer admits that Yelland signed a written application for insurance on November 20, 1926; that Yelland was examined by Dr. Rand on November 26, 1926, and that a report of his examination was forwarded to

appellant. Copies of the application and of the several parts of the medical report are attached to and made a part of the answer.

Appellant's answer denies, on information and belief, the allegation that Hickman represented to Yelland that he would be insured as soon as he signed the written application, gave the promissory note for the premium, and passed Dr. Rand's medical examination.

Appellant's answer denies all of the allegations of Paragraphs VII and VIII of the amended complaint, except as to the demand upon appellant for payment of the alleged contract of insurance, and appellant's refusal and failure to do so. These latter allegations are admitted.

Appellant's answer sets up, as new matter, that part of Paragraph 11 of the written application for insurance, signed by Yelland, which reads as follows:

> "11. It is agreed on behalf of myself and of any person or persons who may have or claim any interest in any policy that may be issued under this application as follows: * * * (2) That under no circumstances shall the insurance hereby applied for be in force until payment in cash of the First Premium, and delivery of the policy to the applicant in person, during his lifetime and while in good health. * * *"

Appellant's answer also alleges, as new matter, that the Yelland application and medical report were received at appellant's home office in Omaha on November 29, 1926; that appellant had received no application for insurance on the life of Yelland, other than the one signed by him, a copy of which is attached to and made a part of the answer; and that according to appellant's information and

belief, Yelland had died on November 28, 1926, prior to the receipt of the application and medical report at appellant's home office.

Appellant's answer further alleges, as new matter, that appellant had never made or entered into any contract of insurance on Yelland's life; that no contract or policy of insurance, made or written by appellant on Yelland's life, had been delivered to Yelland, or to any one on his behalf, during his lifetime and while in good health; and that the application for insurance, signed by Yelland, had never been accepted by appellant.

Appellant's answer further alleges, as new matter, that Hickman was neither a general agent or a manager for appellant, but that, on the contrary, he was merely an agent with limited duties and powers, and that he had "no authority or power to make, alter or discharge any contract, or any application for insurance, or to modify any of the terms, conditions or provisions of any contract or application for insurance for or on behalf of said defendant company; that all the authority or powers possessed by said F. L. Hickman in connection with, for and on behalf of said defendant company were special and limited, and not those of general agent and manager or general agent or manager."

Appellee's amended reply to appellant's answer admits that the application signed by Yelland, contained in Paragraph 11 thereof the provision heretofore set forth, but alleges that Hickman waived said provision on behalf of appellant, and said amended reply again alleges that Hickman, "as a part of the consideration for said Yelland's

entering into said contract of insurance", expressly agreed that the insurance should be in full force and effect "as soon as the said Yelland successfully passed the medical examination given by Dr. M. J. Rand."

Appellee's amended reply to appellant's answer denies all of the other allegations of said answer, except that Louis A. Yelland died on November 28, 1926.

Appellant demurred to appellee's amended reply on the ground that said amended reply did not state facts sufficient to constitute a defense to the new matter set forth in appellant's answer. This demurrer was overruled by the District Court.

(c) THE EVIDENCE.

At the trial of the case, the witnesses on behalf of the appellee were Mrs. Yelland herself; Steven Doutre, a neighbor of the Yellands; Arthur H. Yelland, brother of Louis A. Yelland; Dr. Edward E. Hamer, State Health Officer of the State of Nevada; N. H. Chapin, Cashier of the Ely National Bank; and Dr. M. J. Rand, physician and appellant's medical examiner at Ely, Nevada. Doutre, Chapin and Dr. Rand testified by deposition; the other witnesses appeared and took the witness stand at the trial.

Counsel for appellee also offered, as part of his case, certain portions of the testimony contained in the deposition of W. G. Preston, Vice-President and Chairman of the Executive Committee of appellant company, and certain portions of the testimony contained in the deposition of F. L. Hickman. The District Court ruled (Tr. 85) that this

testimony was to be treated as if the witnesses had been offered by appellee, at least as to all matter offered by counsel for appellee on his case.

If any question should be raised as to the propriety of the District Court's ruling in this regard, the attention of the court is called to

Revised Laws of Nevada (1912), Sec. 5457,

which is Sec. 515 of the Civil Practice Act of Nevada, and reads as follows:

> "When a deposition has been once taken, it may be read in any stage of the same action or proceeding by either party, *and shall then be deemed the evidence of the party reading it.*"

The witnesses for appellant were F. L. Hickman; E. L. Dunn, Secretary of appellant company; and W. G. Preston, Vice-President and Chairman of the Executive Committee of appellant company. All of these witnesses testified by deposition.

The evidence offered on appellee's case is as follows:

(1) Mrs. Yelland testified on her own behalf, on direct examination, that she first met F. L. Hickman on November 18, 1926, when he came to the Yelland ranch with B. H. Robison (Tr. 57-8). After a few minutes conversation, the three men went to Robison's home (Tr. 58). Hickman came back the next day, November 19, 1926, and went hunting with Mr. Yelland (Tr. 58). The two men spent the night in the foothills, and came down for breakfast the next morning, November 20, 1926 (Tr. 58). After breakfast, Hickman asked Mr. Yelland to take out insurance in appellant company (Tr. 58-9). Mr. Yelland was reluctant

to apply for a policy because he needed his cash for expenses that would be incurred in the Spring, in connection with the shearing of his sheep (Tr. 60). Hickman then said that he would take a note for the premium, and that the policy would be in effect the same as if cash were paid (Tr. 60: VI). Hickman also said that he had authority to make that statement, because "I am their intermountain manager" (Tr. 60: VI); and added that the insurance would be effective at the time the note was given, if Dr. Rand's examination was satisfactory (Tr. 60: VI).

Mrs. Yelland also testified, on direct examination, that she was present during the conversation between Hickman and Mr. Yelland, and saw the note given (Tr. 61). She said the application was signed November 20, 1926, and was taken by Hickman, together with the premium note, when he went away (Tr. 62). She also testified that after Mr. Yelland's death, she caused demand to be made on appellant for payment of the alleged contract (Tr. 63: X). She said Yelland died about one o'clock in the morning on November 28, 1926 (Tr. 64). She never saw Hickman again after he went away on November 20, 1926 (Tr. 64). She said she could not remember whether Robison said anything about Hickman's connection with any life insurance company, at the time Robison introduced Hickman to Yelland, but that Hickman said he was intermountain manager for the Bankers Reserve Life Company (Tr. 65: XII, XIII).

On cross-examination, Mrs. Yelland said that Hickman's statement that he was intermountain manager was made on November 20, 1926 (Tr. 67). She also said that the

"most part" of the conversation between Hickman and Yelland was held *before the application was signed* (Tr. 66). Her testimony is very uncertain as to where she was during this conversation—at one place she says she was in the adjoining room, attending to her household duties, and in another place that she was present until after the application was signed (Tr. 66). *She admitted that neither Mr. Yelland nor herself made any investigation of Hickman's agency before the application was signed, and that they knew nothing relative thereto, except what Hickman himself told them* (Tr. 67).

On re-direct examination, she testified that the demand on appellant was made for her by her father-in-law, John Yelland (Tr. 67-8: XIV). She said she did not know whether Hickman gave a receipt for the premium note; that she had not been able to find one (Tr. 68).

On re-cross examination, she said she had looked for a receipt, but was not able to find any (Tr. 68). She said she did not see any receipt given, but admitted that it might have been handed to Mr. Yelland when the men went outside later (Tr. 68).

Steven Doutre testified, by deposition, on behalf of appellee, as follows: that he had known Louis Yelland all his life (Tr. 119); and was also acquainted with Hickman, having been introduced to him by Robison in November, 1926, before Louis Yelland died (Tr. 120: LI, LII); that, in introducing Hickman, Robison had described him as intermountain manager of Bankers Reserve Life Insurance Company (Tr. 120: LI, LII). Doutre testified that Hick-

man had also said that he was "manager" for appellant, at the time the introduction took place (Tr. 120-1: LIII); that after the introduction, Hickman handed him a card, bearing the words, "The Bankers Reserve Life Company, Omaha, Nebraska. Its Policies not Excelled in the World. F. L. Hickman, 601 Deseret Bank Bldg., Salt Lake City, Utah" (Tr. 121: LIV).

Doutre also stated that Hickman had visited him for the purpose of selling him insurance, and had said that he had "sold several premiums" in the valley where Doutre lived (Tr. 122: LV, LVI); that Hickman said he had *already* insured Yelland, and expected to insure Robison (Tr. 123: LVII); and that any insurance for which Doutre might apply would be in force right after the medical examination was passed (Tr. 123-4: LVIII, LIX).

Doutre also testified that he had received, through the mails, an envelope bearing the inscription or legend, "The Bankers Reserve Life Company. B. H. Robison, Founder, Omaha, Nebraska. Its Policies not Excelled in The World. F. H. Hickman, Intermountain Manager, 601 Deseret Bank Bldg., Salt Lake City, Utah" (Tr. 125: LX); and that it contained a letter from Hickman (Tr. 125).

(3) Arthur Yelland testified on behalf of the appellee, on direct examination, as follows: that he knew F. L. Hickman, having met him sometime between November 20 and November 26, 1926 (Tr. 126); that Hickman had come to Arthur Yelland's place to sell him insurance (Tr. 126-7: LXII); that he told Hickman he "was not financially fixed to take care of a policy at that time" (Tr. 127: LXII).

Hickman then told me that he would sell me a policy on the same condition that he made with my brother (Tr. 127: LXII, LXIII). He stated that he had sold Louis a policy *the day before,* taking his note for the premium (Tr. 127-8: LXII, LXIII). He also told me that my policy, if I took one out, would be in force immediately after I passed the medical examination (Tr. 128: LXII).

Arthur Yelland further testified, on direct examination, that Hickman had handed him a business card bearing an inscription similar to that mentioned by Doutre in his testimony (Tr. 128: LXIV); and that Hickman had introduced himself as intermountain manager (Tr. 128: LXIV). Hickman left some blanks with me "in case I should decide to take out a policy" (Tr. 129: LXIV); and also an eye shade (Tr. 129: LXIV) bearing the words "F. L. Hickman, Intermountain Manager, Bankers Reserve Life Company". I looked for the eye shade before coming to court, but could not find it (Tr. 129).

On cross-examination, Yelland admitted that his conversation with Hickman was held at Arthur Yelland's home, and that no one else was present at the time (Tr. 130).

(4) Dr. Edward E. Hamer testified on behalf of appellee, on direct examination, as follows: that he is a duly qualified and licensed physician, and is State Health Officer of Nevada (Tr. 95); that he had been in practice for twenty-one years, and had examined quite a few applicants for insurance (Tr. 95), making the examinations on behalf of the insurance companies (Tr. 95).

On *voir dire* examination, Dr. Hamer stated that he had never served as home office physician, or as medical director, for any insurance company (Tr. 95); and that the had served as field physician only (Tr. 95).

At the conclusion of his *voir dire* examination, Dr. Hamer testified further on direct examination, as follows: from an inspection of the report of the Yelland medical examination, I would say that he passed it (Tr. 95-6: XXXI); and that he was a good insurance risk (Tr. 96-7: XXXI).

(5) N. H. Chapin testified on behalf of appellee, as follows: that he had been Cashier of the Ely National Bank for four and one half years (Tr. 116); that he knew Louis A. Yelland personally (Tr. 116); and was acquainted with his financial condition (Tr. 116-7: XLVII). Chapin testified that his bank would not have been willing to "cash" the Yelland note, not because they would not loan Yelland that much, or even a greater amount, but because the bank did not discount insurance notes (Tr. 117-8: XLVIII). Chapin further testified that Yelland was absolutely good for the amount of the premium note, and that he would not have hesitated to discount Yelland's note for such an amount (Tr. 118-9: XLIX).

(6) Dr. M. J. Rand testified on behalf of appellee, as follows: that he is a regular practicing physician in Ely, Nevada (Tr. 115); that he has been in practice for twenty-two years, seven of them in Ely (Tr. 115); that he knew Louis A. Yelland, and examined him for the Bankers Reserve Life Company (Tr. 115). Rand testified that Yelland died shortly after the medical examination was made (Tr.

115); but that he did not recall the exact date (Tr. 116). Dr. Rand further testified as to the cause of death (but this testimony is omitted because the parties stipulated at the trial that Yelland died as a result of injuries accidentally sustained).

(7) The part of W. G. Preston's testimony which was adopted by appellee, and read into evidence from his deposition, as part of the plaintiff's case, is as follows: I think we did recognize Hickman, in our correspondence, as our intermountain manager, with offices at Salt Lake City (Tr. 81-2). I have been in Hickman's office in Salt Lake City (Tr. 114-5). I do not recall any sign on his office door relating to him, or any such sign as "Bankers Reserve Life Company, F. L. Hickman, Manager" (Tr. 115). The only sign which I noticed was that of the National City Company of New York; that was the one which impressed me (Tr. 115). The sign, "Bankers Reserve Life Company, F. L. Hickman, Manager," might have been on the door so far as I know (Tr. 115; CV).

(8) The part of F. L. Hickman's testimony which was adopted by appellee, and read into evidence from his deposition, as part of the plaintiff's case, is as follows: On January 5, 1924, I was living in Provo, Utah; and about that time I signed a contract to act as intermountain manager for the Bankers Reserve Life Company in Utah, Nevada and Southern Idaho (Tr. 83). My duties were to appoint sub-agents and also write insurance (Tr. 83). When sub-agents were to be appointed, I prepared their contracts in triplicate, and sent them to the company's home office for signature (Tr. 83). Under my contract, the

territory which it covered was exclusive territory (Tr. 83); but no business other than mine was handled in my office in Salt Lake City (Tr. 83).

Hickman further testified, on plaintiff's case, that Louis A. Yelland was reluctant to sign an application for insurance, because he needed his money for expenses to be incurred in the Spring in connection with the shearing of his sheep (Tr. 83); that Hickman told Yelland that his policy would become effective at once if he would give a note for the premium (Tr. 83). Hickman stated that he did not tell Yelland what would be done with the note, except that if the *"policy was not accepted, the note would be returned to him"* (Tr. 83).

Hickman further testified that his contract with the company was not necessarily secret, but was held in confidence between them (Tr. 86); and that the contract was not shown to Yelland (Tr. 86). He also said that he had been in the insurance business for seven and one-half years before starting to work for appellant, and that during those years he was agency manager for the Intermountain Life (Tr. 86).

Hickman again stated that his duties included the selection of sub-agents (Tr. 86-7); and that these sub-agents worked under him (Tr. 87). He then qualified his testimony by stating that he merely recommended the sub-agents, and after preparing their contracts, on an agreed commission basis, he sent them, together with an application for a state license, to appellant's home office for approval and signature; that he did not retain a copy of such contracts until they came back, signed by the com-

pany, at which time he sent one to the agent and kept one, and that the company retained a copy when the others were sent back to him (Tr. 87). He stated that, in the year 1926, he had about twenty sub-agents in Utah (Tr. 87), and two in Nevada (Tr. 88).

Hickman further testified that he acted as intermountain manager for appellant for five years (Tr. 88: XXV), from 1924 to 1929, terminating his relationship with appellant on February 15, 1929 (Tr. 88). He said the company maintained an office in Salt Lake City at 601-2 Deseret Bank Bldg. (Tr. 89); that the company paid the rent for this office (Tr. 89: XXVI); and that the company also paid for his clerical hire, which consisted of the salary of his secretary and assistant, one Miss Birrell, the only employee of the company in his office (Tr. 89).

Hickman further testified that he was not paid any salary, and that he worked entirely on commissions, which included part of those earned by his sub-agents (Tr. 89-90); and that he received commissions both on new policies and renewals (Tr. 90). He stated that he did not deduct his commissions before remitting collections to the company (Tr. 90); the company sent them back to him (Tr. 90).

Hickman further testified that the sign on his office door read, "F. L. Hickman, Intermountain Manager for the Bankers Reserve Life Company" (Tr. 90: XXVII).

Hickman further testified that he did not publish appellant company's annual statement covering its 1926 business (Tr. 90-1); but that such a statement was published,

in one of the Salt Lake City newspapers, either in March or April, 1927 (Tr. 91-2). He said he did not personally file a copy of the published statement with the State Commissioner of Insurance, and did not know of his own knowledge whether one had been filed (Tr. 92). He stated that he did publish similar statements in 1925 and 1926, and that such publications were made under the caption, "F. L. Hickman, Intermountain Manager" (Tr. 92: XXVIII).

Hickman further testified, upon being shown an envelope bearing the legend, "The Bankers Reserve Life Company, Omaha, Nebraska. Its policies not excelled in the world. Return after five days to F. L. Hickman, Intermountain Manager, 601 Deseret Bank Bldg., Salt Lake City, Utah", that he had several different forms of stationery, all of which carried wording similar to that on the envelope (Tr. 93: XXIX).

Hickman further testified that he was introduced to Louis Yelland by B. H. Robison (Tr. 94); and that Robison also introduced him to Steven Doutre (Tr. 97-8) when he called on Doutre with reference to writing insurance for him (Tr. 94-5: XXX); and that Robison described Hickman as being intermountain manager, in introducing him to Doutre (Tr. 97-8: XXXIII).

Hickman further testified that the business envelope shown him—bearing the same inscription heretofore mentioned—had been mailed from his office to Doutre, and may have contained either a letter, or an inquiry blank seeking certain reports on Doutre's neighbors (Tr. 98-9: XXXIV).

Hickman further testified that copies of the annual statements, as published in Salt Lake City papers, were sent to appellant's home office (Tr. 99). *He stated that the company did not direct him to make such publication, but merely gave him the privilege of doing so* (Tr. 100). *He added that the synopsis contained in the published statement was taken from the official report furnished by the company directly to the State Commissioner of Insurance* (Tr. 100); *that the caption, "F. L. Hickman, Intermountain Manager", was not included in the company's official report to the State Insurance Commissioner, but was placed on the newspaper publication by Hickman himself* (Tr. 100).

Hickman further testified that the business card shown him—bearing an inscription similar to that already mentioned—was used by him in his business, and that he generally left them with people (Tr. 100-1: XXXVI); and that he also distributed eye shades which bore similar wording (Tr. 101: XXXVI). He said that he did not remember whether he gave one of the eye shades to Louis Yelland, but he knew he distributed a lot of them through the valley where Mr. Doutre lived (Tr. 101).

Hickman further testified that he interviewed Arthur H. Yelland at about the same time he called on the brother, Louis Yelland (Tr. 101-2: XXXVII); that he called on Arthur Yelland without an introduction (Tr. 102), but that he may have introduced himself as intermountain manager of appellant company, "as that was my usual way of making my introduction" (Tr. 102: XXXVIII).

Hickman further testified that he first called on Louis Yelland between November 15 and November 20, 1926 (Tr. 102); and took his application for insurance November 20, 1926 (Tr. 102-3). Mrs. Yelland was present during Hickman's conversations with Yelland, and at the time the application was taken, but Bert Robison was not (Tr. 103). He also stated that he agreed to take a note for the first premium because of Yelland's impending expenses (Tr. 103).

Hickman further testified that he was not certain when he first learned of Yelland's death, but that it was soon after he died (Tr. 104).

Hickman further testified that he mailed the Yelland application and note to his Salt Lake City office from Baker, Nevada (Tr. 104). He stated that Dr. Rand's report of his medical examination was mailed directly to the company (Tr. 105).

Hickman further testified that he had selected Dr. Rand to act as appellant's medical examiner; and that Dr. Rand had made such examinations in that vicinity for at least two years (Tr. 115-6: XL). On this point he qualified his testimony, when his deposition was read on defendant's case, by stating that he merely recommended medical examiners to the home office (Tr. 163).

Hickman further testified that he wrote to the home office relative to Yelland's death, but said he could not remember just when he sent his letter (Tr. 107). He stated that he did not know whether this letter or the application reached the home office first (Tr. 107). He also stated that

the application had been sent to Omaha from Salt Lake City on November 26, 1926, but that he did not know when it reached appellant's home office (Tr. 107). He stated that he did not recall just when the company instructed him to forward the Yelland note, but was certain he had advised them, at the time the application was sent in, that he had taken the note (Tr. 107). He also stated that he did not know whether he gave Yelland a receipt at the time the note was given (Tr. 108).

Hickman further testified that the policy which would have been issued on the Yelland application was the sort known as a monthly income policy on the ordinary life plan, non-participating, with double indemnity in case of accidental death, and total disability payments (Tr. 108: XLI); and that the commuted value of the policy would be $10,200 (Tr. 110: XLIV). He also stated that one of his own policies—which was shown to him by counsel for appellee—was similar to the one for which Yelland applied, the difference being in the amount of the policy, and the provisions relative to double indemnity and total disability (Tr. 108-9: XLII). He further stated that policies issued by appellant in Utah and Nevada were very similar (Tr. 109-10: XLIII). He also said that he was familiar with the commuted values of the policies he wrote (Tr. 111: LXXXX).

Hickman further testified that he did not return the Yelland note; but sent it to the company (Tr. 112). He said that he wrote his name on the back of the note when he mailed it to his office in Salt Lake City (Tr. 112), *and*

added the words "for cancellation" when he sent the note to the home office (Tr. 112).

Hickman further testified that the published statement certified to by the Commissioner of Insurance of Utah was the one published in 1927, covering the company's business for 1926 (Tr. 113-4).

Hickman further testified that he never received any application from Yelland, other than the one already introduced in evidence (Tr. 114).

In addition to this verbal testimony, counsel for appellee offered documentary evidence consisting of the Yelland application; the several parts of the medical examiner's report; the Yelland premium note; part of counsel's letter to the company tendering the note and making demand for payment of the alleged policy; part of Mr. Preston's reply denying liability and returning the note; a certified copy of Sec. 1143 of the Insurance Laws of Utah (Tr. 70-1, 72-4: XVI); a certified copy of appellant's annual report for the year 1926, as published in the Salt Lake Daily Tribune (Tr. 75-81: XVIII and XX); and also several business cards and envelopes used by Hickman (112-3, 189: XLVI; 126: LXI; 131: LXVI; 246-7: CX).

Such was the evidence offered, and admitted by the court, to support a complaint which alleged nothing more than that Hickman, as General Agent and Intermountain Manager of appellant company, and pursuant to a practice and custom which had procured for appellant many profitable contracts of insurance, had induced Louis A. Yelland to sign an application for insurance by represent-

ing to him that the insurance would be in full force and effect as soon as he signed an application, gave a note for the first annual premium, and passed Dr. Rand's medical examination.

The evidence introduced on defendant's case, is as follows:

(1) E. L. Dunn testified, by deposition, on direct examination, that since January 16, 1929, he has been secretary of the Bankers Reserve Life Company; and for twenty years previous had been assistant secretary (Tr. 143). He said that on November 29, 1926, he was assistant secretary, having supervision of the office and the duty of opening all mail (Tr. 143). He said that mail received at the home office was stamped with the date of arrival (Tr. 143); and that the date stamped on the Yelland application shows that it was received at the home office on November 29, 1926 (Tr. 143-4). He stated that the medical report, as shown by the date marked thereon, was received the same day, November 29, 1926 (Tr. 104). He testified further that all mail was opened under his supervision by clerks sitting at his desk (Tr. 144); that it was then sorted by him for distribution to the various departments (Tr. 144); and that all applications were sent, as soon as they were received, to the medical department to be entered on the application register (Tr. 144). Each application was accompanied by the blank called the Home Office Memorandum (Tr. 145).

> Note: A copy of the Home Office Memorandum, connected with the Yelland application, is set forth on page 149 of the Transcript of Record.

Dunn further testified, on direct examination, that the medical department reference inquiry blanks were sent out from Hickman's office, in Salt Lake City, to the references mentioned in Yelland's application (Tr. 145). It is the company's practice to permit the larger agencies to send these blanks direct in order to save time. The use of these inquiry blanks is a part of the company's regular investigation of applications (Tr. 146); and the blanks sent by Hickman to Robison and Doutre were received at the home office on December 3, 1926 (Tr. 146).

Dunn further testified, on direct examination, that all applications were entered on the book known as the application record, as soon as they were received (Tr. 146). He stated that line 32 on page 1451—which is set out on page 154 of the printed Transcript—contains the entries relative to the Yelland application (Tr. 146-7); and the entries in the last two columns on that line show that Yelland's application was rejected on December 3, 1926, because of his death (Tr. 147). Dunn further stated that the application record is kept in his department at all times (Tr. 147).

On cross-examination, Dunn testified as follows: that *Hickman was employed as a soliciting agent,* with headquarters in Salt Lake City (Tr. 155); that the only thing accompanying the Yelland application was the form Letter of Advice (Tr. 155, 159). According to the company's custom, acknowledgment of the Yelland application would have been sent to Hickman (Tr. 155); but the witness did not know of any correspondence with Yelland relative to the application (Tr. 155).

Dunn further testified, on cross-examination, that he had never been in Hickman's office in Salt Lake City (Tr. 155).

He also stated that, by reason of his duty of opening all mail, he had received other mail from Hickman (Tr. 155); and that the envelope shown to him by counsel for appellee was similar to envelopes which had come into his hands (Tr. 155-6). He said that the envelope in which the Yelland application was received went into the waste basket, along with the rest of the envelopes (Tr. 156); and that he did not remember whether that particular envelope was similar to the one shown him by counsel for appellee (Tr. 156).

Dunn further testified, on cross-examination, that the reference or inquiry letters in connection with the Yelland application were mailed from Hickman's office in Salt Lake City, and not from Omaha (Tr. 156). He said that Hickman, operating in parts of Utah, and Idaho, had authority to send out these blanks (Tr. 156-7), because of the company's practice of permitting distant agencies to send them out for the purpose of saving time (Tr. 157). An agency near the home office would not send them out (Tr. 157); but the Salt Lake City office is considered one of the far distant agencies (Tr. 157).

Dunn further testified, on cross-examination, that he did not know whether Hickman was intermountain manager for appellant (Tr. 157-8); and that he did not remember having received letters from Hickman on stationery representing him to be such (Tr. 158). He also

said that he did not have any letter from Hickman relative to the Yelland application, except the one which had already been shown—the Letter of Advice sent in by Hickman with the Yelland application (Tr. 158).

Dunn further testified, on cross-examination, that the Yelland claim had been "turned down" by the company (Tr. 158); but that he did not know how notice of rejection of the claim was given (Tr. 158). He said that Mr. Preston, Vice-President of the company, is the one who would know (Tr. 158).

On re-direct examination, Dunn testified that in November, 1926, he had nothing to do with agency matters; and that he does not have now (Tr. 158); that he has nothing to do with acknowledging applications, as that work is not in his department (Tr. 158); and that he has no personal touch with such matters (Tr. 158), or personal knowledge of the company's custom in connection therewith (Tr. 158-9). He stated that the stamp in the lower left corner of the Yelland letter of advice shows that the application was received at the home office on November 29, 1926, and that no "settlement" accompanied it (Tr. 159).

On re-cross examination, Dunn testified that the Yelland Letter of Advice was received in one of Hickman's regular envelopes (Tr. 159), bearing the inscription, "The Bankers Reserve Life Company, Omaha, Nebraska. Its Policies not excelled in the World. Return after five days to F. L. Hickman, Intermountain Manager, 601 Deseret Bank Building, Salt Lake City, Utah" (Tr. 159-60).

On re-direct examination, Dunn testified that he had no present recollection as to the character of envelope in which the Yelland application was received at the home office, and that he did not remember whether there was any printing on that particular envelope (Tr. 160). He stated that it was not a matter of practice at the home office to save envelopes (Tr. 160).

(2) F. L. Hickman testified, by deposition, on direct examination, that in November, 1926, he was working for the Bankers Reserve Life Company of Omaha, *soliciting insurance in Nevada* (Tr. 161-2); but was not connected with that Company now (Tr. 162). He said that he became acquainted with Louis A. Yelland in November, 1926, and took his application for insurance during that same month (Tr. 162). He further stated that after taking Yelland's application, he sent it to his office in Salt Lake City, where it arrived November twenty-sixth, 1926 (Tr. 162). According to custom, it was forwarded from there to the Company's home office in Omaha (Tr. 162).

Hickman further testified, on direct examination, that he never received any application from Yelland other than the one already in evidence, but that he did receive a "note of settlement" (Tr. 162-3). He stated that the words "F. L. Hickman" and "for cancellation" on the back of the Yelland note are in his hand-writing (Tr. 163). He also stated that he sent the original note to his office in Salt Lake City, where it was kept until the Company wrote to him requesting that it be sent to the home office (Tr. 163). He said he did not know who

sent the request for the note, but that he did recall that it was sent to Omaha on request from the home office (Tr. 163).

He added that he could not say whether the note was sent to the Company's home office before or after December third, 1926 (Tr. 164).

Hickman further testified, on direct examination, that he did not remember whether he had received any money on account of the Yelland note, but said that he thought he would remember it if he had (Tr. 164). He stated that so far as he could remember he gave Yelland a receipt when he took the application and note (Tr. 164), and that the receipt was on the regular form supplied by the Company (Tr. 164).

Hickman further testified, on direct examination, that *at no time during his connection with the Bankers Reserve Life Company did he make a practice of altering or changing the terms of the application; that it was not the practice to change the application with reference to any of the printed matter which it contains, except to mark out of Question Eight the forms of policy not desired by the applicant; that at no time did he ever alter, change or modify any of the terms or provisions contained in the application, except to mark out of Question Eight the forms of policy not desired; and in dealing with Louis A. Yelland he did not change or modify the terms or conditions of the application signed by Yelland in any manner, or in any particular other than in Question Eight; and that he never made any agreement with any applicant as to the terms and conditions which*

were to go into an insurance policy, or tell any applicant that a policy would read in any certain way (Tr. 164-5). He added that he never collected the note from Yelland, and never made any claim against his estate on account of it (Tr. 165).

Hickman further testified, on direct examination, that he had been in the insurance business for seven and one-half years before he went to work for the Bankers Reserve Life Company; and that he had spent those years acting as Agency Manager for the Intermountain Life (Tr. 165).

Hickman further testified, on direct examination, that all field medical examiners are appointed by the home office medical department, on recommendation of the various agents (Tr. 163).

Hickman's cross examination, as read at this place on the defendant's case, was substantially the same as that part of his testimony which was offered by counsel for appellee on the plaintiff's case. To avoid unnecessary repetition, we will not repeat here the parts of his testimony that were introduced on the plaintiff's case.

The balance of Hickman's cross examination is as follows: That while he was acting for the Bankers Reserve Life Company, his offices were at Rooms 601-602 Deseret Bank Building, Salt Lake City, Utah (Tr. 169).

According to my recollection, my contract with the Company made me Intermountain Manager (Tr. 169: LXXXI).

That whenever he recommended the appointment of a sub-agent who needed training, that training was given in his office (Tr. 171).

That he did not recall how much he received from appellant by way of commissions during the year 1926, but that it may have been the amount shown in the schedule filed by the Company in the office of the State Insurance Commissioner, i. e., Twelve Thousand Five Hundred Thirty-Two and 45/100 Dollars ($12,532.45) (Tr. 171-2: LXXXIII).

The company never objected to the Yelland note (Tr. 185).

Hickman also stated that he was in a position to advise sub-agents with reference to various kinds of policies (Tr. 188: LXXXXI).

He said that the Bankers Reserve Life Company had discontinued its office in Salt Lake City, and had had no office there since March first, 1929 (Tr. 188-9: LXXXXII).

> NOTE: Hickman's testimony that the Company had never objected to the Yelland note was read by counsel for appellee on plaintiff's case, but it was overlooked when we prepared that part of this summary of evidence.

On redirect examination, Hickman testified that contracts which he prepared for proposed sub-agents were signed by them before being sent to the Company (Tr. 191); that his name does not appear as a contracting party in these agreements (Tr. 191); but appears only as a recommending party (Tr. 191).

Hickman further testified, on redirect examination, that his leaving appellant's employ did not affect the sub-agents (Tr. 191), or his assistant and secretary, Miss Birrell (Tr. 193).

Hickman further testified, on redirect examination, that he received part of the commissions earned by his sub-agents, and that this part was the difference between the rate of commission specified in his own contract and the rate specified in theirs (Tr. 191). *He also stated that all commissions which he received, both on his own business and on that of the sub-agents, were based on his contract of January, 1924* (Tr. 192). He said his contract gave him no authority to discharge his sub-agents, but the practice of the Company was to act in harmony with him, by cancelling the license of any sub-agent when he requested it (Tr. 192-3). In such cases, the cancellations were made by the Company; not by him (Tr. 193).

Hickman further testified, on redirect examination, that the endorsements on the back of the Yelland note are in his hand-writing (Tr. 191); that he knew of Yelland's death at the time he sent the note to the Company's home office (Tr. 191); that the note was forwarded to the Company in response to a letter from Mr. Preston (Tr. 192). He testified that he never accounted to the Company for its part of the premium represented by the Yelland note, but sent the note itself (Tr. 193). He also said that he never credited himself, or charged the Company, with the commission to which he would have been entitled on the Yelland application if it had "gone through" (Tr. 193); that as a matter of fact, he treated it as a closed incident (Tr. 193).

Hickman further testified, on redirect examination, that Miss Birrell had no contract with appellant, but was under bond payable to the Company (Tr. 192); that her salary was paid directly by the Company (Tr. 192).

Hickman further testified, on redirect examination, that he had joint use of a stenographer with the concern occupying the office next to his (Tr. 192); that *"later"* they had a sign on the office door (Tr. 192); and that that sign was "National City Bank of New York" (Tr. 192).

> NOTE: In this connection, attention is called to the fact that the date of Mr. Preston's visit to Hickman's office is not shown by the evidence in this case. He testified, as will appear in the summary of his evidence, that the sign of the National City Bank was on the office door at the time of his visit.

Hickman further testified, on redirect examination, that he did not know whether his communication was the first advice as to Yelland's death which the Company received (Tr. 193); that he had no knowledge of the telegram from the Retail Credit Company, received by appellant on December third, 1926 (Tr. 193); and that he never saw the Retail Credit Company's report of Yelland's death (Tr. 193-4).

At this place the Court sustained the objection of counsel for appellee to a question propounded to Hickman by appellant's counsel, as to who had the "final say" whether the Company would accept or reject an application for insurance. The question was qualified by the clause, "if you know" (Tr. 194: LXXXXIII).

(3) W. G. Preston testified, by deposition, on direct examination, that he is first vice-president and treasurer of the Bankers Reserve Life Company and chairman of its Executive Committee (Tr. 194-5); and has been a vice-

president for more than ten years, and a director of the Company and chairman of the Executive Committee since 1904 (Tr. 194-5). He testified that he attends the meetings of the Board of Directors, and has been familiar with its action on all matters since 1904 (Tr. 195). He stated that he had many executive duties, among which were those of general supervision (Tr. 194); and that as part of his executive duties he had something to do with correspondence (Tr. 194). His duties of general supervision embraced various departments, including investments, legal matters, agency matters and other duties (Tr. 194). He testified that he had general charge of the Application and Medical Departments, as well as custody and general supervision of the home office files and records (Tr. 194-5). As chairman of the Executive Committee, he stated, he had something to do with passing on applications and determining whether they should be accepted (Tr. 194-5). He testified that in November, 1926, he had all of the duties hereinbefore enumerated, and has had them at all times since (Tr. 195). He said that as an executive officer he had general charge of all such matters as policies, inquiries, files, inspections, mails, policy issues, policy claims, policy loans and policy loan securities (Tr. 195).

Preston further testified, on direct examination, that in November, 1926, Hickman represented appellant Company in Utah. He said he was familiar with Hickman's hand-writing, and recognized the signature in the lower left hand corner of the Yelland application as being his (Tr. 196). He stated that the Yelland application was

received at the Company's home office November twenty-ninth, 1926 (Tr. 196).

Preston further testified, on direct examination, that he was familiar with the customary practice and routine of appellant's home office (Tr. 196); and was able to state what was done with the Yelland application when it arrived in Omaha (Tr. 196). Preston stated that the application was placed with the other mail on the desk of E. L. Dunn, assistant secretary, where it was opened by him and his clerks, stamped with the date of arrival, and sent by Dunn to the Application Department, where it was received by the clerk in charge of the Application Record, and entered in that book (Tr. 196). He stated that defendant's Exhibit "E"—see Transcript of Record, page 154—is a correct photostatic copy of page 1451 of the Application Record (Tr. 196-7).

Preston further testified, on direct examination, that Dr. Rand's report of his medical examination of Yelland was received at the home office on November twenty-ninth, 1926 (Tr. 197); and that the Medical Department's reference inquiry blanks—sent in by Robison and Doutre—were received on December third, 1926 (Tr. 197). He further stated that on December third, 1926, the Company received a message from the Retail Credit Company, which had been directed to obtain an "inspection" on Yelland, that he was dead (Tr. 198); that no action having been taken on the Yelland application before receipt of this telegram, he directed that the notation which appears at the bottom of the home office memorandum relative to the Yelland application, be placed there, and

that this was done and the notation signed by him on December third, 1926 (Tr. 197-8).

Preston further testified, on direct examination, that in November, 1926, the Company had a definite practice and custom in handling applications (Tr. 198); *that according to that custom, after an application was recorded, an inspection was requested from an inspection agency, such as the Retail Credit Company in this case, and the application papers were laid aside until the reference blanks and inspection reports were received* (Tr. 198). That the Medical Department's reference inquiry blanks, received at the home office on December third, 1926, were sent out from Hickman's office in Salt Lake City (Tr. 199-200); that it was a part of the Company's regular custom and practice at that time to send out such blanks (Tr. 200); *and that Hickman was allowed to send out such blanks from his office because of the Company's practice of having agents at distant points do this in order to save time* (Tr. 200). *Preston stated that Nevada was regarded as being very distant from Omaha* (Tr. 200).

Preston further testified, on direct examination, that in reliance on the information contained in the Retail Credit Company's telegram he had directed the making of the entries "Rej." and "dead" which appear in the last two columns of Line 32, on page 1451, of the Application Record, and that these entries were made on December third, 1926, by the clerk in charge of the Application Record (Tr. 198-9). Preston further stated that the Yelland application was never actually passed upon by

the Company, because of his death on November twenty-eighth, 1926, while the application was laid aside awaiting receipt of the inspection report and the reference inquiry blanks (Tr. 200). He further stated that after learning of Yelland's death, he wrote to Hickman on December tenth, 1926, inquiring whether any settlement had been made (Tr. 200); that in response to his letter, Hickman sent in the Yelland note (Tr. 200). Preston added that on December twentieth, 1926, he wrote to Mrs. Yelland, as the proposed beneficiary named in the Yelland application, sending her the note (Tr. 201). The next time he saw the note, he stated, was when it came to the Company by mail from Mr. Billings, some six months later (Tr. 201); that he mailed it back to Billings at once, and hasn't seen it since then (Tr. 201).

At this point the Court sustained objections by counsel for appellee and refused to permit counsel for appellant to prove by the testimony of Preston that appellant Company never received any application for insurance on the life of Yelland, other than the one theretofore admitted in evidence (Tr. 201-2: LXXXXIV); that the premium called for in the Yelland application had not been paid (Tr. 203: LXXXXV); that the Company never received any "proceeds" from or because of the Yelland note (Tr. 203-4: LXXXXVI); that the Company never received any money or premium of any kind or character on the Yelland application (Tr. 204-5: LXXXXVII); and that the Company never received any consideration of any kind for or because of the Yelland application (Tr. 205: LXXXXVIII).

Thereafter Preston further testified, on direct examination, that the Company's files do not contain, and never did contain, any contract of insurance, or any instrument purporting to be a contract or policy of insurance, between the Company and Yelland (Tr. 206); that no contract or policy of insurance was ever made by the Company on the life of Yelland (Tr. 206); and that no policy was ever delivered to Yelland, or to anyone acting for him, or on his behalf, during his lifetime and while he was in good health (Tr. 206). Preston further stated that, according to the Company's custom and practice in November, 1926, final action with reference to approval or disapproval of applications was taken by the Executive Committee, of which he had been chairman for twenty-six years (Tr. 206).

Preston further testified, on direct examination, that the Company's Medical Director is W. F. Milroy, who lives in Omaha, Nebraska (Tr. 207-8).

At this point the Court sustained objections by counsel for appellee and refused to permit counsel for appellant to prove by the testimony of Preston that the Company had not accepted the Yelland application (Tr. 208-9: C); that Hickman was neither General Agent or Manager for appellant Company at any of the times stated in appellee's amended complaint (Tr. 209-10: CI); that Hickman was only a limited soliciting agent (Tr. 210: CII); that Hickman possessed no authority or power to make, alter or discharge any contract on any application for insurance, or to modify any of the terms, conditions or provisions of any contract or application for insurance, for or on behalf of appellant Company (Tr. 210-11: CIII).

Thereupon Preston further testified, on direct examination, that the Yelland application was not the first one sent in by Hickman (Tr. 212); that he had previously sent in numerous applications, on which the policies, when issued, were sent to him for delivery (Tr. 212); *that so far as he knew, all applications taken by Hickman were submitted to the home office for its action* (Tr. 212).

Preston further testified, on direct examination, *that the Company had never authorized, by resolution or otherwise, any agent to contract a verbal policy of insurance; and that the Board of Directors had never authorized any agent or representative of the Company to enter into a contract of insurance in any manner other than by means of written applications submitted to the home office* (Tr. 212).

At this point the Court sustained objections by counsel for appellee and refused to permit counsel for appellant to prove by the testimony of Preston that the Board of Directors had never recognized, ratified or authorized any contract of insurance based upon procedure other than a written application forwarded to the home office and passed upon there (Tr. 212-3: CIV).

Thereupon Preston further testified, on direct examination, that appellant's Board of Directors had never authorized or provided that any policy of insurance should go into effect or become a contract, *save and except on delivery of the policy to the applicant personally, during his lifetime and while in good health* (Tr. 213).

Preston further testified, on direct examination, that the agents' advance payment receipt form introduced in

evidence as defendant's Exhibit "F"—see Transcript of Record, page 167—is the same, both front and back, as the one in use in November, 1926 (Tr. 213-4); and that such forms were supplied to all agents, including Hickman (Tr. 214). Preston further stated that the company's files contain no receipt given by Hickman to Yelland, nor any copy thereof (Tr. 214); and that there is nothing in the Company's practice or custom which would bring such receipt back to the home office (Tr. 214).

Preston further testified, on direct examination, that November twenty-ninth, 1926, fell on a Monday (Tr. 214).

On cross examination, Preston testified that it was four days after Yelland died before the Company learned of his death (Tr. 231); and that this information came through the Retail Credit Company's telegram (Tr. 231). He said that he believed that Hickman advised the Company about the death of Yelland, but at a later time (Tr. 231).

Preston further testified, on cross examination, that so far as he knew the Company had no correspondence with Hickman relative to the Yelland application, except the letter of advice which accompanied the application, the Company's acknowledgment of receipt of the application (Tr. 231), and the letter from Hickman, after Yelland's death, in which the premium note was sent to the Company (Tr. 231-2).

Preston further testified, on cross examination, that when the note was received from Hickman, Preston mailed it to Mrs. Yelland, as the proposed beneficiary named in the application (Tr. 232).

Preston further testified, on cross examination, that the Retail Credit Company was employed by the home office, and not by Hickman, to make the "inspection" on Yelland (Tr. 232). He stated that the reference inquiry blanks were sent out from Hickman's office, but were returned direct to the home office (Tr. 232-3).

Preston further testified, on cross examination, that he thought that the Company had received envelopes, bearing the inscription, "The Bankers Reserve Life Company, Omaha, Nebraska. Its policies not excelled in the world. Return after five days to F. L. Hickman, Inter-mountain Manager, 601 Deseret Bank Building, Salt Lake City, Utah" (Tr. 233); but that he did not know that any such envelopes had been received before the filing of the Yelland claim (Tr. 233).

Preston further testified, on cross examination, that he had been in Hickman's office in Salt Lake City (Tr. 233); but that he did not recall any sign on the door, except that of the National City Company of New York (Tr. 233-4). He stated that that is the sign which impressed him (Tr. 233-4). Preston also stated that the sign, "Bankers Reserve Life Company, F. L. Hickman, Manager", might have been on the door so far as he knew (Tr. 234: CV).

Preston further testified, on cross examination, that as a member of the Executive Committee, he had some charge or oversight of agencies (Tr. 234). *He testified that Hickman did not have supervision over any state, but was merely a soliciting agent* (Tr. 234), *for parts of Utah and Idaho and possibly a little of Nevada* (Tr. 234). Preston also testified that the Company does not call those states

the Intermountain States (Tr. 234); although the territory west of the Rocky Mountains and east of the Cascades might be described the intermountain district (Tr. 234).

Preston further testified, on cross examination, that Hickman used the title "Intermountain Manager" on his letterheads and envelopes as a matter of pride (Tr. 234-5). Preston said he did not know when Hickman first began to use it, or how long he had been using it (Tr. 235). He stated that he knew that Hickman had been using this title on his letterheads and envelopes, but did not know of it before the Yelland claim came up (Tr. 235).

Preston further testified, on cross examination, that *all agents are permitted to have helpers and sub-agents* (Tr. 235). He stated that sub-agents in Hickman's territory may, or may not, have reported to him with respect to the policies they wrote (Tr. 235). He also said that he did not think there was any agent working under Hickman at Ely, Nevada (Tr. 235-6).

Preston further testified, on cross examination, that he could furnish a synopsis of the company's annual statement, as filed in the office of the Commissioner of Insurance in Utah, *but that he knew nothing of a publication of such statement in the Salt Lake Tribune in March, 1927* (Tr. 236). *Preston also stated that he did not know whether the Company's annual statements were published under the caption, "F. L. Hickman, Manager"* (Tr. 236). Preston testified that he thought the Company, in its correspondence, recognized Hickman as its intermountain

manager, with offices at Salt Lake City (Tr. 236-7). Preston then testified that Hickman's duties in the states in which he represented the Company were to *solicit insurance* through himself and any sub-agents he might have (Tr. 237). He testified that Hickman was not paid a yearly salary, but worked solely on commissions (Tr. 237). He stated that he did not have at hand the information necessary to enable him to say whether Hickman earned more than Twelve Thousand Dollars ($12,000.00) in commissions in 1926 (Tr. 237); and did not know whether the statement for 1926, filed in the office of the Commissioner of Insurance by the Company, shows that Hickman was paid Twelve Thousand Five Hundred Thirty-Two and 45/100 Dollars ($12,532.45) that year (Tr. 237-8).

Preston further testified, on cross examination, that he would not be able to say, without examining the Company's records, in just what states the business had been written on which Hickman was paid commissions, but that he thought it was mostly on Hickman's own business in Utah and Nevada (Tr. 238-9: CVI). He said that there were not more than two or three agents working under Hickman, and none recently (Tr. 239: CVII). *Preston stated that it was not a fact that Hickman received a portion of the commissions on all policies written in Utah, Nevada and Idaho by the Company's other agents* (Tr. 239).

Preston further testified, on cross examination, that *the Yelland policy was not issued before the Company learned of his death* (Tr. 239). He testified that he did not know whether Yelland was "absolutely eligible" for the kind of policy mentioned in his application (Tr. 239-

40); that he had no occasion to pass on the question whether the inquiry letters and medical report showed Yelland to be a desirable risk, because the investigation had not been completed before receipt of the telegram announcing that Yelland was dead (Tr. 240); that for the same reason, he had had no occasion to pass on the question whether the investigation, as far as it had gone, showed Yelland to be a desirable risk (Tr. 240). He said that so far as he knew nothing defective in the applicant had been shown by the investigation up to the time the telegram was received (Tr. 240-1: CVIII). Preston also stated that the inquiry letters—sent in by Robison and Doutre—were received at the Company's home office the same day the telegram from the Retail Credit Company arrived (Tr. 240).

Preston further testified, on redirect examination, that the Company had never attempted to collect on the Yelland note, but had sent it to Mrs. Yelland as soon as it was received (Tr. 241).

In addition to the foregoing verbal testimony, appellant offered certain documentary evidence, consisting of the Yelland application; the various parts of the report of Yelland's medical examination; the Letter of Advice which accompanied the Yelland application; various forms used by the Company, such as the home office memorandum, the agent's advance payment receipt form, form letter sent out by the Company with policies when they were issued and sent to the agents for delivery; page 1451 of the Company's Application Record, which contains the entries relative to the Yelland application; the

Medical Department's reference inquiry blanks sent in by Robison and Doutre; the telegram from the Retail Credit Company; and Hickman's contract with the Company.

We wish to call the Court's attention particularly to Hickman's contract. It appears on pages 220 to 228 of the Transcript of Record. Upon examination, it will be noted that this contract provides that Hickman is employed "for the purpose of *procuring applications* for insurance" (Tr. 220, line 6); that "the said district is not assigned exclusively to said party of the second part" (Tr. 221, line 18); and that "the said party of the second part shall possess no authority not herein expressly granted, *shall not make, alter, or discharge any contract, or modify any of the terms, conditions or provisions of any contract,* and shall receive no further remuneration for any service than is herein provided (Tr. 221, lines 23-5).

II.

SPECIFICATION OF ERRORS.

On this appeal, appellant relies upon errors of the District Court as follows:

(1) The District Court erred in admitting parol testimony as to the alleged promise of Hickman that the insurance would be in full force and effect upon signing the application, paying the first premium, and passing the medical examination.

This embraces the following rulings of the court:

(a) Admitting Mrs. Yelland's testimony that Hickman had agreed that the insurance for which Mr. Yelland applied would be in full force and effect as soon as the application was signed, a note given for the first premium, and the medical examination passed (Tr. 58, 60: VI); and

(b) Failing to sustain appellant's motions to strike this testimony at the time it was given (Tr. 61: VII); at the conclusion of Mrs. Yelland's testimony (Tr. 69: XV); at the close of plaintiff's evidence (Tr. 134-5, 141; LXIX); and at the close of all the evidence (Tr. 247-8: CXI).

(2) The District Court erred (a) in overruling appellant's demurrer to appellee's amended reply; (b) in denying appellant's motion for judgment on the pleadings; (c) in overruling appellant's objection to the introduction of any evidence; (d) in denying appellant's motion for a directed verdict at the close of plaintiff's evidence; (e) in denying appellant's motion for a directed verdict at the close of all the evidence; and (f) in entering judgment in favor of plaintiff and against defendant.

This embraces the following rulings of the court:

(a) Overruling appellant's demurrer to appellee's amended reply (Tr. 47-8, 42: Additional Assignment of Error III);

(b) Denying appellant's motion for judgment in its favor on the pleadings (Tr. 55-6: III);

(c) Overruling appellant's objection to the introduction of any evidence, said objection having been made on the ground that appellee's amended complaint did not state a sufficient cause of action (Tr. 57: V);

(d) Denying appellant's motion for a directed verdict at the close of plaintiff's evidence (Tr. 141-2, paragraphs b, c, d, and i: LXXX, parts 2, 3, 4 and 9);

(e) Denying appellant's motion for a directed verdict at the close of all the evidence (Tr. 250-1: CXV); and

(f) Entering judgment in favor of the plaintiff and against the defendant (Tr. 51-3: I).

(3) The District Court erred in admitting evidence as to declarations and statements of Hickman and Robison relative to Hickman's powers and authority, the sign on the door of Hickman's office, the business cards, letterheads, envelopes and souvenir eye shades used by him, and the caption on the publication of appellant's annual statements.

This embraces the following rulings of the court:

(a) Admitting Mrs. Yelland's testimony that Hickman stated that he was Intermountain Manager, and that he had authority to state that the policy for which Yelland applied would become effective on giving a note, the same as if cash were paid (Tr. 60: VI; 65: XII);

(b) Denying appellant's several motions to strike Mrs. Yelland's testimony (Tr. 61: VII; 65-6: XIII; 69: XV; 134-5, 141: LXIX; 139, 141: LXXVII; 247-8: CXI);

(c) Admitting Hickman's testimony that he acted as Intermountain Manager for five years (Tr. 88: XXV; 170: LXXXII); that he called on Doutre for the purpose of selling him insurance (Tr. 94-5: XXX); that he was introduced to Doutre as Intermountain Manager (Tr. 97-8: XXXIII); that he interviewed Arthur Yelland, at about the same time he called on Louis Yelland (Tr. 101-2, 179-80; XXXVII); that he introduced himself as Intermountain Manager to Arthur Yelland (Tr. 102, 180: XXXVIII); that he selected Dr. Rand as medical examiner, and that Dr. Rand had made medical examinations in that vicinity for several years (Tr. 105-6, 183-4: XL); that his contract made him Intermountain Manager (Tr. 169: LXXXI); that when he was introduced to Louis Yelland and Steven Doutre by Robison he was described as Intermountain Manager (Tr. 176-7: LXXXV, LXXXVI); that appellant paid the rent for his office in Salt Lake City (Tr. 89: XXVI); that he sent Doutre a letter in his business envelope (Tr. 98-9: XXXIV); and that copies of the published annual statement were sent to appellant's home office (Tr. 99, 177, 178: XXXV);

(d) Admitting Hickman's testimony relative to the sign on his office door (Tr. 90, 172-3: XXVII); relative to the captions on the published annual state-

ments of appellant's business (Tr. 92, 174-5: XXVIII); relative to his business envelope (Tr. 93, 175-6: XXIX); relative to the business card used by him (Tr. 100-1, 178-9: XXXVI);

(e) Admitting Doutre's testimony that Robison introduced Hickman as Intermountain Manager (Tr. 119-20: LI); that Hickman said he was "manager" (Tr. 120-1: LIII); that Hickman said that he had insured Yelland and expected to insure Robison (Tr. 123: LVII); that Hickman told Doutre that if he took out insurance, it would be effective on signing an application, giving a note for the premium, and passing the medical examination (Tr. 123-4: LVIII); that Hickman handed him a business card on which Hickman was described as Intermountain Manager (Tr. 121: LIV); that he had received through the mails from Hickman a business envelope bearing a similar inscription (Tr. 125: LX); that Hickman had called on him for the purpose of selling him insurance (Tr. 122: LV);

(f) Denying appellant's several motions to strike Doutre's testimony (Tr. 120: LII; 122: LVI; 124: LIX; 138-9, 141: LXXVI; 247-8: CXI);

(g) Admitting Arthur Yelland's testimony that Hickman had said he would write insurance for Arthur Yelland on the same conditions made with Louis Yelland, and that the policy would be in effect on signing an application, giving a note for the premium, and passing the medical examination (Tr. 126-8: LXII, LXIII); that Hickman gave him a

business card and eyeshade on which Hickman is described as Intermountain Manager (Tr. 128-9: LXIV);

(h) Denying appellant's several motions to strike Arthur Yelland's testimony (Tr. 130-1; LXV; 135-6, 141: LXXI; 138-9, 141: LXXVI; 247-8: CXI);

(i) Admitting Preston's testimony that the sign "Bankers Reserve Life Company, F. L. Hickman, Manager", *might have been* on Hickman's office door (Tr. 115, 234: CV);

(j) Admitting in evidence Section 1143 of the Insurance Laws of Utah, the certificate of the Secretary of State attached thereto, and the certified copy of the statutory publication of appellant's annual statement covering its 1926 business (Tr. 70-1, 72-4, 78-81: XVI, XX);

(k) Denying appellant's several motions to strike out said Section 1143 of the Insurance Laws of Utah (Tr. 138, 141: LXXV; 247-8: CXI);

(l) Permitting counsel for appellee to read to the jury the certified copy of the statutory publication of appellant's annual statement (Tr. 75-8: XVIII);

(m) Admitting in evidence, and permitting to be read to the jury, Hickman's business envelope (Tr. 112-3, 189: XLVI; 126: LXI; 246-7: CX);

(n) Admitting in evidence Hickman's business card and envelope attached as exhibits to the Rand, Chapin and Doutre depositions (Tr. 131: LXVI);

(o) Denying appellant's motion to strike all testimony relative to conditions in Salt Lake City, and

to the sign on the door of Hickman's office there (Tr. 135, 141: LXX; 247-8: CXI; 248: CXII); and

(p) Denying appellant's motion to strike all testimony relative to the caption on the statutory publication of appellant's annual statement (Tr. 248-9: CXIII).

(4) The District Court erred in refusing to admit evidence offered by appellant to prove that Hickman did not possess authority to make the contract alleged by appellee, and to prove that there was no contract between appellant and Yelland.

This embraces the following rulings of the court:

(a) Refusing to permit counsel for appellant to ask Hickman who had the final say, if he knew, as to whether or not the company would accept an application (Tr. 194: LXXXXIII);

(b) Refusing to permit counsel for appellant to prove by the testimony of Preston that Hickman was neither a general agent or manager for appellant (Tr. 209-10: CI);

(c) Refusing to permit counsel for appellant to prove by the testimony of Preston that Hickman was a limited soliciting agent (Tr. 210: CII);

(d) Refusing to permit counsel for appellant to prove by the testimony of Preston that Hickman had no authority or power to make, alter or discharge any contract or application for insurance, or to modify any of the terms, conditions or provisions of any contract or application for insurance, for or on behalf of appellant (Tr. 210-11: CIII);

(e) Refusing to permit counsel for appellant to prove by the testimony of Preston that the appellant's board of directors had never recognized, ratified or authorized any contract of insurance based upon any procedure other than a written application forwarded to the company's home office and passed upon there (Tr. 212-13: CIV);

(f) Refusing to permit counsel for appellant to prove by the testimony of Preston that the Yelland premium note was never paid to the company (Tr. 203: LXXXXV);

(g) Refusing to permit counsel for appellant to prove by the testimony of Preston that the company never received any proceeds from, or because of, said note (Tr. 203-5: LXXXXVI);

(h) Refusing to permit counsel for appellant to prove by the testimony of Preston that the company never received any money or premiums of any kind or character on the Yelland application (Tr. 204-5: LXXXXVII);

(i) Refusing to permit counsel for appellant to prove by the testimony of Preston that the company never received any consideration of any kind or character for, or because of, the Yelland application (Tr. 205: LXXXXVIII);

(j) Refusing to permit counsel for appellant to prove by the testimony of Preston that the Yelland application had never been accepted by appellant (Tr. 208-9: C); and

(k) Refusing to permit counsel for appellant to prove by the testimony of Preston that Yelland had

never made any application to appellant for insurance, other than the application theretofore admitted in evidence (Tr. 201-2: LXXXXIV).

(5) The District Court erred in admitting evidence not material under the issues offered by the pleadings.

This embraces the following rulings of the court:

(a) Admitting the testimony given by the witness Hamer, to the effect that, in his opinion, the medical examiner's report on Yelland indicated that Yelland had passed the medical examination, and that he was a good insurance risk (Tr. 96-7: XXXI);

(b) Denying appellant's motion to strike the aforesaid testimony given by Hamer, when said motion was made at the time the testimony was introduced (Tr. 97: XXXII); when said motion was renewed at the close of plaintiff's evidence (Tr. 137, 141: LXXIII); and when said motion was renewed at the close of all the evidence (Tr. 247-8: CXI);

(c) Admitting the testimony of the witness Chapin, that he was acquainted with Yelland's financial status (Tr. 116-7: XLVII); that if his bank would have refused to "cash" the Yelland premium note, it was not because they would not have been willing to loan Yelland that amount, or a greater amount, but because the bank did not discount insurance notes (Tr. 117-8: XLVIII); and that Yelland was "absolutely good" for the amount of the premium note (Tr. 118-9: XLIX);

(d) Denying appellant's motion to strike the aforesaid testimony given by Chapin, when said mo-

tion was made at the time the testimony was introduced (Tr. 119: L); when said motion was renewed at the close of plaintiff's evidence (Tr. 137-8, 141: LXXIV); and when said motion was renewed at the close of all the evidence (Tr. 247-8: CXI);

(e) Admitting Mrs. Yelland's testimony that she caused demand for payment to be made on appellant (Tr. 63: X);

(f) Admitting Mrs. Yelland's testimony that such demand was made by her father-in-law (Tr. 67-8: XIV);

(g) Admitting Hickman's testimony that he interviewed Doutre with reference to writing insurance for him (Tr. 94-5: XXX);

(h) Admitting Hickman's testimony that he interviewed Arthur Yelland at about the same time he called on Louis Yelland (Tr. 101-2, 179-80: XXXVII);

(i) Admitting Hickman's testimony as to the kind of policy that would have been issued on the Yelland application (Tr. 108, 186-7: XLI);

(j) Admitting Hickman's testimony that his own policy was similar to the one for which Yelland applied (Tr. 108-9: XLII);

(k) Admitting Hickman's testimony that the policies written by appellant in Nevada and Utah were similar (Tr. 109-10, 187: XLIII);

(l) Admitting Hickman's testimony that the commuted value of the policy for which Yelland applied was $10,200 (Tr. 110, 187: XLIV);

(m) Admitting Hickman's testimony that he knew the commuted value of the various policies he wrote (Tr. 111, 188: LXXXX);

(n) Admitting Hickman's testimony as to the amount of commissions paid him by appellant in 1926, and whether this amount was shown in the report filed by appellant with the Insurance Commissioner of Utah (Tr. 171-2: LXXXIII);

(o) Admitting Hickman's testimony that he was in a position to advise sub-agents with reference to the various kinds of policies they wrote (Tr. 188: LXXXXI); and

(p) Admitting Hickman's testimony that appellant had discontinued its office in Salt Lake City (Tr. 188-9: LXXXXII);

(6) The District Court erred in refusing to give the jury proper instructions requested by appellant.

These instructions are as follows:

(a) "On signing the application for insurance in the evidence, the Louis Yelland referred to in the evidence, was bound to inform himself of the terms and restrictions therein contained, and that the nature and extent or limitations on the authority of F. L. Hickman, the alleged agent of the defendant, are to be found from all evidence before you; that if you find from the evidence that the authority of said Hickman was to procure applications for insurance and forward same to the home office of defendant company, and to receive first premiums in cash

and upon issuance of policies by said home office to receive such as were sent by said home office to him and deliver them respectively to the persons entitled thereto, and you do not find that said Hickman had authority from defendant company to make, change, alter or modify the same, then the agency of said Hickman was a particular or special agency, and he had no authority in law to waive any provision of said written application'' (Tr. 251-2, 260: CXVI).

(b) ''You are instructed that one dealing with an agent should ascertain the extent of his authority from the principals or from some other person, who will have a motive to tell the truth in the interests of the principal; that one dealing with an agent cannot rely upon the statement of the agent for the fact or extent of the agency nor upon assumption of authority by the agent or upon mere presumption that such person is an agent or upon presumption as to the extent of his agency'' (Tr. 252, 260: CXVII).

(c) ''Unless you find from the preponderance of the evidence that F. L. Hickman, the person whose name is signed to the application for insurance Exhibit ..... in the evidence was authorized, or held out as being so authorized on November 20, 1926, by defendant company, to make contracts of insurance with persons desiring same, to agree with said persons on the terms and conditions of such contracts and the effective date and dates thereof, to waive or change the terms and conditions and character of

the payment of the first premium on such policies viz., to accept in lieu of cash in full a note payable to himself due approximately seven and one-half months after the date of the application and the date of the note,—then it is your duty to return a verdict for the defendant.

"And the Court states to you that the facts, if they or either thereof be facts, that said Hickman sometimes used stationery on which was printed the name of defendant company, and said Hickman's name followed by the words 'Intermountain Manager', are not of themselves sufficient to justify the conclusion or finding that said Hickman was a general agent or manager of defendant company or any of its business, or that he was clothed with any such authority as is mentioned in the first paragraph of this instruction" (Tr. 252-3, 260: CXVIII).

(d) "You are instructed that generally a general agent or manager of an insurance company is one who is authorized to accept insurance risks, agree upon and settle the terms of the insurance contracts, issue policies by filling out blank instruments furnished him for that purpose and to renew policies already issued.

"That generally a person who procures applications for insurance forwards them to some officer or committee by whom they are accepted and policies are issued, or the application rejected,—and collects the premiums and delivers the policies when they are

issued, is a soliciting or special and not a general agent or manager'' (Tr. 253, 260: CXIX).

(e) ''You are instructed that in law every person who undertakes to deal with an alleged agent is, by the mere fact of agency, put upon inquiry, and must discover at his peril that the act which such alleged agent proposes to do in its nature and scope within the power and authority of such alleged agent to do; that the authority held by such agent is in its nature and extent sufficient to permit the alleged agent to do the proposed act, and that such power and authority for its source can be traced to the will of the alleged principal.

''That this rule is particularly applicable where one is dealing with an alleged agent whose authority he knows, or in the exercise of ordinary prudence should know, is special; or where one is dealing with an alleged agent in his first transaction with such person; or where the circumstances connected with the matter do or should in common prudence, put one on inquiry; or where it appears from the circumstances of the particular matter that the interests of the alleged agent and alleged principal are adverse; or that the authority assumed or represented is of an unusual, improbable, or extraordinary nature'' (Tr. 253-4, 260: CXX).

(f) ''The Court instructs you that if a person deals with one considered by him to be an agent and makes no inquiry as to the authority of such con-

sidered agent, from the principal or some third person having a motive to tell the truth in the interests of the principal, but on the contrary such person so dealing chooses to rely on the agent's statements, such person is chargeable with knowledge of the agent's authority, whatever it in fact be, and his actual ignorance of the extent or limitation of such authority is no excuse and the fault, if any, cannot be thrown upon the principal who never authorized the act or contract being considered'' (Tr. 254-5, 260: CXXI).

(g) ''The Court instructs you that on signing the written application for insurance in evidence, the said Louis Yelland was bound to inform himself of the terms, conditions and contents thereof and the restrictions therein contained, and that the nature and extent or limitations of the authority of the alleged agent, F. L. Hickman, are to be found from all the evidence before you; that unless you find from a preponderance of all said evidence that said F. L. Hickman had the authority to act in the name of and in the place and stead of defendant company and determine for said company whether or not it would waive the written provisions of said written application, and particularly those providing,

> '' '11. It is agreed on behalf of myself and of any person or persons who may have or claim any interest in any policy that may be issued under this application as follows:

"'(2) That under no circumstances shall the insurance hereby applied for be in force until payment in cash of the first premium, and delivery of the policy to the applicant in person, during his lifetime and while in good health.' * * *

then it is your duty to return a verdict herein for the defendant.

"And in this connection the Court states that the facts, if they are or either thereof be facts, that at times the said Hickman used stationery or cards on which was printed defendant company's name, his own name and after his name the words 'Intermountain Manager,' and that said Hickman in conversations referred to himself as intermountain manager for defendant company, if he did, and that there was painted on the door of an office in Salt Lake City the name of defendant company followed by the name of said Hickman and the words 'Intermountain Manager' if such was the fact, and that certain publication was made in the Salt Lake Tribune of defendant's financial condition, if it was, and that with such publication appeared the name of said Hickman and the words 'Intermountain Manager', if it be the fact, are not of themselves sufficient to justify the conclusion that said Hickman had the authority to make the waivers in this instruction referred to" (Tr. 255-6, 260: CXXII).

(h) "You are instructed that in this action the plaintiff seeks to recover upon an oral contract of insurance. By oral contract is meant a contract

which is wholly oral or which is partly written and partly oral. It is incumbent upon the plaintiff in this action to establish by a preponderance of the evidence that such contract was entered into on behalf of the defendant by some officer or agent authorized to execute a contract of such character, because corporations can only act through their officers or agents.

"You are not to presume an agency, but agency must be proven by a preponderance of the evidence, and the acts or declarations of an agent are not of themselves sufficient in law to establish or prove agency.

"In order for the plaintiff to prevail you must find from a preponderance of the evidence that Mr. Hickman was authorized as an agent, orally to enter into a contract for insurance, or that he was a manager of the defendant. As an agent he must have acted within the scope of his authority as such, and you must find if he did enter into such contract that he was specifically authorized to do so by the defendant. A manager of a corporation is one who has the general control of the affairs of the corporation and who has knowledge of all its business and property, and who can in emergencies act on his own responsibility. The very term implies a general supervision of the affairs of the corporation in all its departments. I instruct you that there is no evidence here that Mr. Hickman was such a manager of the business or affairs of the company, and you

must, therefore, in order to find for the plaintiff, find that Mr. Hickman entered into the contract and further that in so doing he acted within the scope of his authority as an agent of defendant'' (Tr. 256-7, 260: CXXIII).

(i) ''You are instructed that a corporation can act only through its agents. The power of an agent may be general or it may be special. It is general when the agent is empowered to do a particular thing or many things in a way necessary or proper to accomplish the end. In this case, however, there is no general agency which has been established by the proof. An agency is special when the agent is empowered to do a particular thing or many things in a limited way. In this case there is no evidence of a general agency or that Mr. Hickman was ever appointed a general agent of the corporation. It is, therefore, for the jury to determine from a preponderance of the evidence whether or not the defendant, acting through Mr. Hickman as a special agent, executed or made the contract in question. You must further find, if Mr. Hickman acted as an agent, that he had the specific authority to make the contract in question. In other words, if you find from a preponderance of the evidence that Mr. Hickman was a special agent of the defendant corporation, then you must also find from the preponderance of the evidence that he was specifically authorized to execute the contract here involved, otherwise the defendant is not bound and your verdict must be for the

defendant, because a special agent must act within the scope of his authority because it is a rule of law that a person dealing with one known to be or shown to be a special agent or claiming to be such, is bound at his peril to see that the agent has the authority to bind the principal in the transaction. That in such situation one may not rely upon the agent's declarations, if any, as to his authority or the extent thereof, but must make other investigation thereof or assume the risk of not so doing'' (Tr. 257-9, 260: CXXIV).

(j) ''You are instructed that the management and control of the business and affairs of a corporation are committed by law to a board of directors or trustees thereof; that any other person assuming or appearing to act for a corporation must in fact derive his power and authority from such board; that a manager of defendant, if any, must have derived his appointment and authority from the board of directors of defendant, directly or indirectly.

''That should you find from a preponderance of the evidence that the said F. L. Hickman was in fact a manager of defendant, you are not entitled to find for plaintiff unless and until you find from a preponderance of the evidence other facts, and among them that the contract in controversy was a usual and ordinary agreement for defendants to make, for the law is that a manager of a corporation has no authority arising from a mere fact of management, if any, to make unusual and extraordinary contracts for a corporation, nor is such manager, if any, authorized

from such mere management, if any, to act in an unusual and extraordinary manner and thereby bind the corporation'' (Tr. 259, 260: CXXV).

(k) ''You are instructed that to constitute one as a manager of a corporation he must be appointed, designated and authorized to transact and manage one or more distinct branches of business which may be and is carried on by the corporation in the state where the act, if any, under investigation was done; one who stands in the shoes of the corporation in relation to the particular business, if any, managed, controlled and conducted by him for the corporation; such person, if any, must be one in fact having a representative capacity and authority derived from the board of directors of a corporation, and neither such capacity or such authority, if any or either, can be created by construction or implication contrary to the intention of the parties'' (Tr. 259-60, 260: CXXVI).

(7) The District Court erred in giving the jury, at the request of counsel for appellee, and over appellant's objection, certain instructions in which the law was incorrectly stated.

These instructions are as follows:

(a) ''The designation of manager implies general powers, and is synonymous with the term of general agent, so far as ostensible powers and authority are concerned'' (Tr. 262, 272-3, 275: CXXVII).

(b) ''You are instructed in this case that no limitations upon the authority of the agent Hickman,

contained in the contract made between The Bankers Reserve Life Company and Hickman, are binding upon the plaintiff or her husband, Louis A. Yelland, because it was a secret agreement between Hickman and the said defendant company, and Yelland did not know of any of its terms and limitations, and therefore was not bound by them'' (Tr. 262, 273, 275: CXXVIII).

(c) ''I think possibly I may be of some assistance to the jury in calling your attention to the fact that in this case the issues as raised by the pleadings present the question of what is referred to as an oral, or a partially oral and partially written contract; and that the main questions of fact to be determined here are, first, as to whether a contract such as is alleged in the complaint was ever made, and, second, if so made, was it made by one representing the defendant, having authority, express or implied authority, to enter into such a contract'' (Tr. 261-2, 273-4, 275: CXXIX).

(d) ''A district manager, embracing in the scope of his territory the States of Utah, Nevada and Southern Idaho, clothed with the power to solicit insurance, receive applications, forward them to the company, receive and deliver the policies and collect the premiums, is in effect a general agent, and as such has power to waive a condition in the application'' (Tr. 262, 274, 275: CXXX).

(e) ''You are instructed that if you find from the evidence in the case that at the time, to wit,

on the 20th day of November, 1926, F. L. Hickman took Louis A. Yelland's application for insurance, that he represented to said Yelland that he was the intermountain manager of The Bankers Reserve Life Company, and the said Yelland believed that the said Hickman was the intermountain manager of said defendant company, and the said defendant company had before and at said time held the said Hickman out to the world as its intermountain manager, having authority to represent it in the states of Nevada, Utah and Southern Idaho, and that the said Hickman at the time of signing said application represented to and agreed with the said Yelland that his contract for insurance with the said defendant company would go into effect as soon as Yelland successfully passed the medical examination of Dr. M. J. Rand of Ely, Nevada, and said Hickman, as said intermountain manager, also agreed with said Yelland to accept his, Yelland's promissory note for $239.60, payment for the first premium on said contract of insurance, and did then and there accept from said Yelland the said promissory note for said first year's premium, and the said Yelland thereafter, to wit, on November 26, 1926, did successfully pass the medical examination of said Dr. M. J. Rand, and was then and there declared by said Rand a good risk, and that the said Yelland thereafter, to wit, on November 28, 1926, died from accidental injuries received the previous day; your verdict should be for the plaintiff, Marion E. Yelland, in the sum of $20,400.00, with interest thereon at 7 per cent per

annum to date, less the promissory note of $239.60, with interest thereon at 8 per cent per annum from November 20, 1926, to date" (Tr. 270-1, 274-5, 275: CXXXI).

III.

BRIEF OF THE ARGUMENT.

(1) THE DISTRICT COURT ERRED IN ADMITTING PAROL TESTIMONY AS TO THE ALLEGED PROMISE OF HICKMAN THAT THE INSURANCE WOULD BE IN FULL FORCE AND EFFECT UPON SIGNING THE APPLICATION, PAYING THE FIRST PREMIUM AND PASSING THE MEDICAL EXAMINATION, FOR THE REASON THAT

(a) Such Testimony Tended to Contradict or Vary the Terms of the Written Application Signed by Louis A. Yelland.

The rule is well settled that where the negotiations of parties are finally reduced to writing, no parol evidence may be offered to prove that the parties agreed, in the prior negotiations, to any matter or thing that is inconsistent with the provisions of the ultimate written memorandum. Indeed, the overwhelming weight of authority is to the effect that when the parties intend or understand that the written instrument embraces their *entire* agreement, no parol proof will be admitted to show that they agreed upon any matter or thing not embraced in the provisions of the written instrument.

In the article on

"*Evidence,*" 22 Corpus Juris 1070, Sec. 1380,

the general rule as to parol or extrinsic evidence affecting writings, is stated as follows:

"General Rule 1. Rule Stated. It is a well established rule of the common law, which has been embodied in statutes in a number of states, that when any judgment of any court, or any other judicial or official proceeding, or any grant or other disposition of property, *or any contract, agreement, or undertaking has been reduced to writing, and is evidenced by a document or series of documents, the contents of such documents cannot be contradicted, altered, added to, or varied by parol or extrinsic evidence.*

"Reason for rule. It has been said that the rule is founded on the long experience that *written evidence is so much more certain and accurate than that which rests in fleeting memory only, that it would be unsafe, when parties have expressed the terms of their contract in writing, to admit weaker evidence to control and vary the stronger and to show that the parties intended a different contract from that expressed in the writing signed by them.* And if the uncertainty of 'slippery memory' furnished a ground for excluding such verbal testimony, as declared in the days of Lord Coke, certainly the modern practice admitting as witnesses the parties directly interested *makes a strict adherence to the rule still more urgent in these days.*

"The rule is a necessary one because of the obvious fact that written instruments would soon come to be of little value if their explicit provisions could be varied, controlled, or superseded by parol evidence, and it is also plain that a different rule would greatly increase the temptations to commit perjury; and courts have expressed regret that in their anxiety to avoid possible injustice in particular cases, they have been gradually construing away a principle *which has always been considered one of the greatest barriers against fraud and perjury."*

In the same article on

"Evidence," 22 Corpus Juris 1112, Sec. 1471,

it is stated that the "parol evidence rule" is applicable to insurance contracts. The rule is there stated as follows:

> "The rule that a contract in writing merges all previous negotiations leading up thereto and, *if its terms are free from doubt or ambiguity,* cannot be altered or contradicted by parol or extrinsic evidence unless in case of fraud or mistake, *is applicable to contracts or policies of insurance."*

Again in the article on

"Evidence," 22 Corpus Juris 1179, Sec. 1571,

it is stated that parol evidence may be admitted in a proper case, to *explain* the written instrument, but this may be done only where there is ambiguity in the written terms of the instrument. The rule is stated as follows:

> "The parol evidence which can be admitted to explain the contract must be such as tends to show the correct interpretation *of the language used,* and its only purpose is to enable the court or jury to understand what the language really means; evidence which has no tendency to aid in the construction of the writing or to explain any ambiguity therein cannot be received. *It is therefore necessary that the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument should be kept steadily in view, the duty of the court being to declare the meaning of what is written in the instrument, not of what was intended to be written."*

In the same article on

"Evidence," 22 Corpus Juris 1180, Sec. 1573,

it is stated that conversations of the parties contemporaneous with or prior to the execution of the written instrument may be admitted in case of ambiguity, but never for the purpose of showing an intention not expressed in the writing. The rule is stated thus:

> "The conversations and statements of the parties at the time of or just previous to the execution of the contract between them may be admissible for the purpose of aiding in the construction of the writing; *but oral declarations of the parties made at or before the time of the execution of the instrument are not admissible for the purpose of showing an intention or purpose not therein expressed."*

These principles are supported by the overwhelming weight of authority. They have been announced repeatedly in the decisions of the United States Supreme Court, the Circuit Courts of Appeal, the Federal District Courts, and in the courts of practically every state in the Union. To attempt to cite or quote from all of these decisions would extend this brief beyond all reasonable proportions. We will therefore confine ourselves to a few.

Among the decisions of the United States Supreme Court, the case of

Northern Assurance Company v. Grand View Building Association, 183 U. S. 308, 46 L. Ed. 213,

decided in 1901, is perhaps the most frequently cited case of all those dealing with the parol evidence rule.

It was an action based on a fire insurance policy. The insurance company defended on the ground that the policy had become void because, in violation of its terms, the insured carried other insurance on the same property with other companies. The plaintiff sought to overcome this defense by proof that defendant's agent knew of the existence of the other insurance, and contended that such knowledge estopped the company from claiming the forfeiture, notwithstanding the fact that the policy contained a provision to the effect that no officer, agent or other representative of the company should have power to waive any provision or condition of the policy.

After reviewing a number of decisions containing divergent holdings on the subject of the application of the parol evidence rule to insurance contracts, the court says:

> "As to the fundamental rule, that written contracts cannot be modified or changed by parol evidence, unless in cases where the contracts are vitiated by fraud or mutual mistake, we deem it sufficient to say that it has been treated by this court as *invariable and salutary* * * *
>
> "Policies of fire insurance in writing have always been held by this court to be within the protection of this rule." (46 L. Ed. 227).

After further consideration and extended review of pertinent decisions of the Supreme Court of the United States, the court summarizes its conclusions as follows:

> "What, then, are the principles sustained by the authorities, and applicable to the case in hand?
>
> "They may be briefly stated thus: *That contracts in writing, if in unambiguous terms, must be per-*

*mitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects * * * "* (46 L. Ed. 234-5).

Before concluding its decision that the plaintiff's parol evidence should not have been admitted, since it tended to contradict the express terms of the written policy, the court makes the following statement:

"It should not escape observation that preserving written contracts from change or alteration by verbal testimony of what took place prior to and at the time the parties put their agreements into that form, is for the benefit of both parties. In the present case, if the witnesses on whom the plaintiff relied to prove notice to the agent had died, or had forgotten the circumstances, he would thus, if he had depended to prove his contract by evidence extrinsic to the written instrument, have found himself unable to do so. So, on the other side, if the agent had died, or his memory had failed, the defendant company might have been at the mercy of unscrupulous and interested witnesses. It is not an answer to say that such difficulties attend other transactions and negotiations, *for it is the knowledge of the inconveniences that attend oral evidence that has led to the custom of putting important agreements in writing and to the legal doctrine that protects them when so expressed, and when no fraud or mutual mistake exists, from being changed or modified by the testimony of witnesses as to conversations and negotiations that may never have taken place, or the real nature and meaning of which may have faded from recollection.*"

(46 L. Ed. 236)

The case of

Thompson v. Knickerbocker Life Ins. Co., 104 U. S. 252, 26 L. Ed. 765,

decided by the United States Supreme Court in 1881, was an action to recover the amount of a policy of insurance issued by the defendant on the life of plaintiff's husband. The policy contained, among other things, a provision that the failure to pay at maturity any note, obligation or indebtedness for premiums due under the policy would cause it to become void, without notice.

The fourth annual premium was paid partly in cash and partly by a note due in six months. Owing to the serious illness of the insured at the time the note became due, and to the plaintiff's lack of knowledge that such a note had been given, the note was not paid at maturity. Ten days after the due date of the note, the insured died.

The insurance company defended on the ground that the policy lapsed because of the failure to pay the premmium note. The plaintiff's replication alleged, among other things, that at the time the note was taken, the *company* agreed that non-payment of the note would not, of itself, cause the policy to lapse, and that the policy was not to become void except at the instance and election of the company. The replication further alleged that no such election had been made or communicated to the insured or to the plaintiff.

In disposing of the contention that this alleged agreement constituted a waiver of forfeiture resulting from the non-payment of the premium note, the court says:

"The fourth replication sets up a parol agreement of defendant made on receiving the promissory note, that the policy should not become void on the non-payment of the note alone at maturity, but was to become void at the instance and election of the defendant, which election had never been made. *As this supposed agreement is in direct contradiction to the express terms of the policy and the note itself, it cannot affect them, but is itself void.* We did hold, in Eggleston's Case, it is true, that any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture. An insurance company may waive a forfeiture or may agree not to enforce a forfeiture; *but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing. So, in this case, a parol agreement supposed to be made at the time of giving and accepting the premium note, cannot be set up to contradict the express terms of the note itself, and of the policy under which it was taken.*"

(26 L. Ed. 768)

The case of

Union Mutual Life Ins. Co. v. Mowry, 96 U. S. 544, 24 L. Ed. 674,

decided in the United States Supreme Court in 1878, was an action to recover the amount of a life insurance policy which had been taken out by the plaintiff on the life of his uncle.

The insurance company defended on the ground that the policy had lapsed, because of failure to pay the second annual premium. To overcome this defense, the plaintiff offered testimony to show that, before the policy was issued, the defendant's agent had stated that the defendant would give notice in advance of the due date of the annual premiums; and that no such notice had been given as to the second annual premium. Under this state of facts, the plaintiff contended, the defendant could not avail itself of such defense.

In disposing of this contention, the court says:

> "But to this position there is an obvious and complete answer. *All previous verbal arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid, was there expressed, for the very purpose of avoiding any controversy or question respecting them. The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated.* If, by inadvertence or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. *But until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the Insurance Company.*"
>
> (24 L. Ed. 675)

And on the next page, the court makes the following observation:

> "The doctrine carried to the extent for which the assured contends in this case *would subvert the salutary rule, that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent.*"
>
> (24 L. Ed. 676)

The case of

> *Merchants' Mutual Insurance Company v. Lyman,*
> 82 U. S. 664, 21 L. Ed. 246,

decided in the United States Supreme Court in 1873, was an action, based on an alleged contract of marine insurance, to recover the value of a brig lost at sea.

Plaintiffs had held an insurance policy in the defendant company on the same brig for a period expiring December 31, 1869. Application for a renewal policy was made, and on January 15, 1870, the plaintiffs sent for it. The policy was issued and dated on that day. The brig had been lost at sea on January 8, 1870, which fact was not disclosed to the company by the plaintiffs when they sent for the policy.

The court held that the plaintiffs were not entitled to recover on the written policy, because of their fraudulent concealment of the fact that the ship had been lost before the policy was in fact issued.

The court also held that the plaintiffs were not entitled to recover on an alleged verbal contract of insurance,

arising out of the order that had been given on December 31, 1869, for renewal of the policy. The reasons given by the court for its conclusion that plaintiffs could not recover on this alleged verbal contract are stated as follows:

> "Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, *and is unembarrassed by any written contract for the same insurance,* it can be proved and become the foundation of a recovery as in all other cases where contracts may be made either by parol or in writing. *But it is also true that when there is a written contract of insurance it must have the same effect as the adopted mode of expressing what the contract is, that it has in other classes of contracts, and must have the same effect in excluding parol testimony in its application to it, that other written instruments have.*
>
> * * * * * * *
>
> "We think it equally clear, that the terms of the contract having been reduced to writing, signed by one party and accepted by the other at the time the premium of insurance was paid, neither party can abandon that instrument, as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose. *The doctrine is too well settled that all previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement* * * * "
>
> (21 L. Ed. 247)

The same rule, that written instruments may not be contradicted or varied by parol proof of the surrounding circumstances, or of the prior negotiations between the

parties, has been stated repeatedly by the United States Circuit Courts of Appeals. The cases are too numerous to cite or quote from all of them, but the following, which were chosen from recent decisions of the courts in different circuits, show that the rule is universal and invariable:

The case of

Rajotte-Winters Inc. v. Whitney Co., 2 Fed. (2d) 801,

decided in this court in 1924, was an action in which the plaintiff sought to recover certain compensation, in addition to the sum provided for in his written contract with the defendant. Plaintiff offered testimony as to the circumstances and conditions under which the contract was entered into, and also as to conversations and negotiations between him and the defendant's engineer prior to the execution of the contract. The trial court excluded this parol testimony, and that ruling of the court was assigned as error.

In disposing of plaintiff's contention that such testimony was admissible, this court, speaking through Mr. Justice Gilbert, said:

> "It is assigned as error that the trial court excluded and refused to consider testimony submitted to show the circumstances and conditions under which the contract was entered into, and particularly the conversations and negotiations between the plaintiff and the defendant's engineer, as to the quantity or character of roadbed to be built, the methods of excavating and removing and placing materials, and the character and amount of necessary equipment

> * * * The plaintiff cites authorities to the general proposition that in considering a written contract it is the duty of the court to consider the circumstances and conditions under which it was made, the situation of the parties, and the purpose to be attained, and that the plain intent of the parties as disclosed by the circumstances and conditions should prevail, rather than a strict and literal interpretation * * * The contract itself is clear and explicit * * *
>
> "There is no contention that there was fraud, mistake, or wanton or arbitrary action on the part of the engineer, and no question is made of his good faith. *In such a case, the execution of a written contract supersedes all oral negotiations concerning its terms, and the whole engagement of the parties is presumed to have been reduced to writing* * * * "
>
> (2 Fed. (2d) 802-3)

The case of

Connecticut Fire Ins. Co. v. Buchanan, 141 Fed. 877,

decided in the United States Circuit Court of Appeals for the Eighth Circuit in 1905, was an action on two fire insurance policies which the company contended had become void, by reason of violation of the clause prohibiting non-occupancy of the insured premises. The plaintiff sought to overcome this defense by proof that the premises were not occupied at the time the policy was issued, and that the agent who wrote the insurance was fully acquainted with that fact. Plaintiff contended that the agent's knowledge of conditions constituted a waiver of the provisions of the policy relative to use and occupancy, or at least worked an estoppel against the company to claim the benefit of them.

The court reviews at considerable length the cases dealing with the use of parol evidence for the purpose of showing waiver of such provisions. After such review of the authorities, the court, speaking through Mr. Justice Van Devanter, makes the following observation:

> "It should be observed that in none of the cases to which reference has been made was the decision made to turn upon any limitation upon the authority of the agent, or otherwise than upon the application of *the salutary rule which prevents the subordination of unambiguous written contracts to parol proof of contemporaneous and prior conditions and negotiations. That the rule announced and applied in these cases has been treated by the Supreme Court of the United States as fundamental and invariable is attested by repeated decisions of that court* * * * "
>
> (141 Fed. 889)

Turning then to the contention that parol agreements might be shown in evidence for the purpose of creating an estoppel against the insurance company, even if they could not be introduced for the purpose of modifying the written agreement itself, the court reviews a number of cases apparently supporting that contention, and then quotes at length from the decision of the United States Supreme Court in *Northern Assurance Co. v. Grand View Building Association,* supra; and with respect to that decision, makes the following statement:

> "Thus the opinion shows that both of the questions presented in the case were deliberately determined by the Supreme Court, after full consideration of its prior decisions and of the conflicting decisions in the state courts; that, in respect of the first question, it was held that, *in the absence of fraud or mutual mistake, unambiguous written contracts must be per-*

mitted to speak for themselves, and cannot, at the instance of one of the parties, be altered or contradicted by parol testimony; and that the theory that such testimony, although not competent to alter or contradict the contract, may yet be received for the purpose of raising an estoppel in pais, is a mere evasion of the true rule and wholly untenable.''

(141 Fed. 897)

And in concluding its decision, the court says:

''In other cases it has been often stated that, in the absence of fraud or mutual mistake, no representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations, as to the terms or legal effect of the resulting written contract, can be permitted to prevail, either in law or in equity, over the plain provisions and proper interpretation of the contract * * *

''The decisions cited exhaust the argument upon the subject. Nothing could be added to what they contain. Because of the error in admitting parol testimony which enabled the insured to recover on policies different from those which the parties had made for themselves, and because of the error in refusing to direct verdicts for the defendants upon the evidence properly admitted, the judgments are reversed, with directions to grant a new trial in both cases.''

(141 Fed. 897-8)

In

International Trading Company v. John Sexton & Co., 24 Fed. (2d) 12,

decided in the United States Circuit Court of Appeals for the Seventh Circuit in 1927, the court makes the following statement:

"It is elementary that, where a party seeks to deny the plain import of a writing which reveals no uncertainty in meaning even when viewed in connection with the circumstances of its making, the rule of substantive law, which declares that all prior extrinsic matters are merged in the writing, governs * * * "

(24 Fed. (2d) 14)

In

Summit Coal Co. v. Southern Cotton Oil Co., 24 Fed. (2d) 48,

decided in the United States Circuit Court of Appeals for the Fifth Circuit in 1928, the rule is stated as follows:

"The contract or contracts between the parties being evidenced by written instruments, *those instruments alone are to be looked to in determining the rights and obligations of the parties."*

(24 Fed. (2d) 49)

In

Lincoln National Life Ins. Co. v. Bastian, 31 Fed. (2d) 859,

decided in the United States Circuit Court of Appeals for the Fourth Circuit, in 1929, the court, on page 861 of the report of the case, states the rule as follows:

"No rule of law is better established as a general rule than this, where the writing is plain, definite, and unambiguous, it cannot be varied by parol evidence showing facts which might have the effect of changing the plain intent expressed by the writing. *The writing is the repository of what the parties meant, and cannot be varied by extraneous evidence* * * * " (citing Northern Assurance Co. v. Grand View Building Association, supra, and other cases).

In

Dickinson Tire & Machine Co. v. Dickinson, 29 Fed. (2d) 493,

decided in the United States Circuit Court of Appeals for the Second Circuit in 1928, the court states the rule as follows:

> "*The excluded letters and testimony, so far as they prove anything, tend to contradict the terms of the written contract as to advances,* rather than to show that the writing was not intended to embody the whole agreement on that subject. *It is elementary that, though the latter may be done, the former may not.*"
>
> (29 Fed. (2d) 495)

The state courts have all adopted and applied the same rule with reference to the use of parol testimony to contradict or vary the terms of a written instrument.

In

Francis v. Mutual Life Ins. Co., of New York, 106 Pac. 323,

decided in the Supreme Court of Oregon in 1910, a judgment in favor of the defendant company was reversed and a new trial ordered, largely because of the extremely suspicious character of the evidence offered in support of the defense, but it was held that the trial court did not err in excluding plaintiff's offer of parol testimony tending to show an oral contract of insurance. The court states its decision on this point as follows:

> "* * * We do not think the court erred in excluding testimony offered by plaintiff, tending to show an oral contract of insurance pending the issuance of

the policy. The transaction between deceased and the agent, *resulting in the making and forwarding the application to the company's head office, was not a contract of insurance, nor was there any evidence of the agent's authority to insure in any case beyond the fact that in certain cases he could issue what is called a 'binding receipt,'* which we shall hereafter notice. The offer was not to the agent, but to the company; to be forwarded to it and passed upon and accepted or rejected by it, and contemplated a policy to be issued by it. *Without satisfactory evidence of the soliciting agent's authority to make such a contract, it would be a dangerous precedent to hold that a mere solicitor for insurance could bind his company to pay a $5,000 loss, by a contract resting purely in parol and of which it could have no knowledge.*

"The cases cited by counsel for plaintiff are cases arising out of claims for fire insurance, where, by custom, local agents are permitted to issue temporary policies and assume temporary risks, even without policies. *No well-considered case can be found where the same rule has been applied to life insurance. The deceased had a right to assume that the soliciting agent he dealt with had authority to take and forward his application, to receive and forward his first premium, and to stipulate for the time and manner in which it should be paid, but had no right to assume that he could insure beyond the extent of giving the so-called 'binding receipt,' mentioned in the application.*"

(106 Pac. 327)

In

Missouri State Life Ins. Co. v. Boles, 288 S. W. 271,

decided in the Court of Civil Appeals of Texas in 1926, the plaintiff sought to recover on an alleged oral contract

of life insurance in a case where the insured had signed a written application, had paid the premium, and had taken the medical examination, but had died before the policy was delivered.

Plaintiff claimed that the agent had agreed that the policy would be effective from the date of the application, but because the negotiations resulted in a written application, the court says:

> "Adverting further to the alleged oral contract, it is essential that the minds of the parties should have met on all the terms of the contract, and *such a contract is not completed where the conversation is a mere negotiation which results in a party submitting an application in writing, which, upon its face, shows it is a mere proposal for insurance. In such cases the oral conversations and negotiations are merged in, and extinguished by, the written application.*"
>
> (288 S. W. 273)

The case of

Banks v. Clover Leaf Casualty Co., 233 S. W. 78,

decided in the St. Louis Court of Appeals, Missouri, in 1921, was an action to recover on a policy of accident insurance. By the terms of the written policy, it did not become effective until January 8, 1917. The accident for which plaintiff seeks to recover, occurred on January 7, 1917. The plaintiff bases his action on an alleged agreement by the agent that the policy, for which a written application had been signed on December 31, 1916, would take effect twenty-four hours after the application was made. The court holds that it was improper to admit parol proof of any such agreement, in the following language:

"Plaintiff simply seeks to abrogate the terms of the contract by proof of an oral agreement made prior to the execution of the written contract. *All antecedent or contemporaneous oral agreements are merged in the written contract and cannot be admitted to abrogate or vary its unambiguous terms; until corrected, it stands as the final contract between the parties.* Insurance Co. v. Mowry, 96 U. S. 546, 24 L. Ed. 674; Graham v. Insurance Co., 110 Mo. App. 98, 84 S. W. 93; Insurance Co. v. Owen Building Co., 195 Mo. App. 373, 192 S. W. 145; Insurance Co. v. Wolfson, 124 Mo. App. loc. cit. 291, 101 S. W. 162; Supreme Lodge, K. P., v. Dalzell, 223 S. W. loc. cit. 789; Schueler v. Met. Life Insurance Co., 191 Mo. App. 52, 176 S. W. 274; Gillum & Co. v. Fire Association, 106 Mo. App. 677, 80 S. W. 283; Riley v. Insurance Co., 117 Mo. App. 233, 92 S. W. 1147; National Union Fire Ins. Co. v. Patrick (Tex. Civ. App.) 198 S. W. 1050.

* * * * * * *

"Plaintiff seeks to nullify the rule that, in the absence of fraud or mutual mistake, parol evidence is not admissible to contradict a written contract, by claiming that the provision in said policy, making the policy effective on the 8th day of January, 1917, was waived by the defendant. For proof of waiver, plaintiff says that defendant's solicitor told plaintiff, contemporaneously with the taking of his application for the policy in question, that the policy would take effect 24 hours after his application was made. *The intention of the parties was reduced to writing, and is expressed in the written application signed by the plaintiff. Said application does not contain any such provision as is claimed, but, on the contrary, it provides that the insurance therein applied for was to be in force at a date subsequent to the date of the application. Plaintiff is bound by his statements contained in said application; there being no evidence introduced showing that the application was procured by fraud.* Said written application was forwarded to the defendant, and the policy issued thereon was in

strict conformity thereto. *No evidence was introduced in this case showing that the defendant's officers who issued said policy had any knowledge that said alleged statement was made.* There is no evidence here of any fraud practiced or mistake made on the part of the defendant in procuring the application or in issuing the policy.

* * * * * * *

" * * The question is simply one of evidence. Obviously the plaintiff is proposing to abrogate the terms of a written contract, plain and unambiguous on its face, by parol testimony, without pleading or showing fraud or mutual mistake. This proposition cannot be entertained. Proof of such oral testimony should have been rejected by the trial court."*

(233 S. W. 80-1)

In the case of

Ivie v. International Life Ins. Co., 117 So. 176,

decided in the Supreme Court of Alabama in 1928, the facts were very similar to those in the instant case. Plaintiff sued to recover on an alleged oral contract of insurance on the life of her husband.

The insurance company defended on the ground that plaintiff's husband had signed an application which contained, among other things, a provision that the insurance was not to be in effect unless and until the policy was delivered to the insured during his lifetime, and while in good health; that no policy was ever delivered; that the application was not approved by the company's medical director; and that, before action had been taken on the application, and while it was under investigation, the company received notice of the death of the applicant, as a

result of which information the policy was never issued. To overcome this defense, the plaintiff's replication alleged that the agent agreed that the insurance would be effective from the date of the application, and that in making such agreement, the agent was acting within the line and scope of his authority.

The court holds that the agent's parol agreement cannot prevail over the express terms of the application and premium receipt. The language of the court is as follows:

> "In Cherokee Life Ins. Co. v. Brannum, 203 Ala. 145, 82 So. 175, it was held, with citation of numerous authorities, that, in the absence of statute law to the contrary, an agent, duly authorized to bind the insurer by the delivery of contracts of insurance, may make such contracts by parol. But where the applicant enters into a definite agreement that the insurance applied for shall not be in effect until the policy is delivered, that such insurance shall be in force from the date of the unconditional approval of the application by the insurer's medical director, and that, if the premium be paid with the application, such payment is made subject to the conditions stated in a receipt which refers to and adopts the conditions stated in the application, the insurance becomes effective only when the conditions have been fulfilled. *Upon consideration of the terms of the several pleas in question and the allegations of the several counts of the complaint, it appears to be necessary to hold that they all relate to one and the same transaction. In that case the alleged parol agreement is in contradiction of the terms of the application, and the receipt and did not affect them. On the other hand, it was a nullity.* Thompson v. Life Insurance Co., 104 U. S. 252, 26 L. Ed. 765. The demurrers to the pleas were therefore overruled without error."
>
> (117 So. 177)

The case of

Pralle v. Metropolitan Life Ins. Co., 252 Ill. App. 460,

decided in the appellate Court of the State of Illinois for the First District in 1929, was also a case very similar to the present one. The action was brought to recover on an alleged oral contract of accident insurance. The written application, after having been signed by the alleged insured, was forwarded by the agent to the company. While the application was under investigation, and before the policy was issued, the insured was accidentally killed. The plaintiff's case is based on the alleged agreement by the agent that the insurance would be effective from the date of the application.

The court decided the case in favor of the insurance company, for reasons stated as follows:

> "We are also of the opinion that the court should have directed a verdict at the close of all the evidence in favor of the defendant as it requested, *for the reason that the evidence without dispute shows that Pralle knew he was signing an application for insurance; and the application states that no insurance would be in force 'unless and until this application is approved at the Home Office of the Company and a policy is issued.' And therefore the parol agreement as testified to by witnesses for the plaintiff, if there were such an agreement, was void.* Ivie v. International Life Ins. Co., 217 Ala. 559, 117 So. 176."
>
> (252 Ill. App. 466)

The case of

Krueger v. Osborn-Meyer, Inc., 228 N. W. 519,

is one of the latest cases turning on the rule that parol

evidence may never be admitted where it tends to contradict the written agreement of the parties. The case was decided in the Supreme Court of Wisconsin on January 7, 1930. It was an action for breach of a contract to erect a bungalow. The plaintiff's case was based on an oral agreement which required the defendant to erect the bungalow on a lot grade or elevation different from the specifications contained in the written contract between the parties.

The lower court admitted evidence as to the parol agreement. This was held to be error requiring reversal and remandment. The ruling of the Supreme Court is set forth in the following language:

> "It is considered that the oral agreement requiring the defendant to so lower the grade of the lot *directly contradicts the terms of the written contract entered into between the parties, and evidence of the contemporaneous parol agreement was improperly received* * * *"
>
> (228 N. W. 520)

The case of

> *House v. Bankers' Reserve Life Co. of Omaha, Neb.,* 180 N. W. 69,

decided in the Supreme Court of South Dakota in 1920, was very similar in its facts to the present case. The more important differences in the two cases consist of the following: in that case, the oral representation as to the time when the insurance would become effective was made by one whose authority as "state manager" was not questioned; and in that case the policy was actually issued and

sent to the agent for delivery, the insured having died, however, the day before the policy was issued. The court held that the provision in the application to the effect that the insurance would not be effective unless and until the policy was delivered to the insured during his lifetime and while in good health, could not be contradicted or varied by parol proof of the oral agreement made by the state manager. The court's holding is stated thus:

> "On the trial respondent called as a witness one Newell, the local agent who solicited and took said application, and who testified that when he took said application one Salmons, *state manager of appellant, was present and stated to applicant that the policy would be in force as soon as it was O.K'd by the doctor, or as soon as he took the medical examination here; that the doctor was practically the man that decided whether he could get insurance or not.* Appellant objected to the reception of this evidence on the ground that it was an attempt to vary the terms of a written instrument. The reception in evidence of this testimony over the objection and exception of appellant is now assigned and urged as error. It is the contention of respondent, and the trial court so held and found, that, by virtue of said representation of Salmons, the evidence of the president of appellant that according to universal rule all policies of appellant were dated as of the date of the reference of the application to the medical committee and the fact that the policy by its terms commenced said term of insurance on the 30th day of January, appellant impliedly waived the said stipulation of the application as to the time of the commencement of the said contract of insurance. *It is uncontroverted that this applicant for insurance, notwithstanding said oral conversation with said Salmons, executed and delivered to appellant the written application containing the said provisions hereinbefore quoted.* Such

are usual and common stipulations in insurance applications. We are of the opinion that the said evidence of Newell, under the circumstances of this case, was erroneously admitted.''

(180 N. W. 69-70)

And the court states its conclusions as follows:

''For the reasons stated in the decisions cited and quoted, we are of the opinion that at the time of the death of the applicant, John A. House, *the provisions of the said application, whereby he agreed that under no circumstances should said insurance so applied for by him be in effect until a delivery of the policy to him during his lifetime while he was in good health, was in full force and effect, the fulfillment of which agreement was a condition precedent to the completion of the contract of insurance thereby applied for by him; that the policy issued after his death was wholly ineffectual either as a completed contract of insurance or as a waiver of the said stipulation contained in the application; and that, by reason thereof, no binding contract of insurance was in existence between appellant and said John A. House at the time of his death.''*

(180 N. W. 71)

(b) Such Testimony Tended to Contradict or Vary the Written Portion of a Contract Alleged to be "Partly Oral and Partly in Writing".

Appellee's amended complaint is based on an alleged contract that was ''partly oral and partly in writing'' (Tr. 3).

A number of the cases heretofore cited show that many courts, including the United States Circuit Court of Appeals for the Ninth Circuit, have taken the position that a written contract must be held to supersede *all* oral nego-

tiations, and that "the *whole* engagement of the parties is presumed to have been reduced to writing". (For a decision to this effect, in the United States Circuit Court of Appeals for this Circuit, see *Rajotte-Winters Inc. v. Whitney Co.,* 2 Fed. (2d) 801, cited on page 79 of this brief.)

Other courts have taken the position that parol testimony may be admitted to prove the *oral* portion of a contract which is partly oral and partly in writing. In such cases, however, the ordinary rule, prohibiting the use of parol testimony to contradict or vary the terms of a written instrument, is applied to the written portion of such contracts.

In

"Evidence", 22 Corpus Juris 1104, Sec. 1459,

the rule as to the use of parol evidence in such cases is stated as follows:

> "Where a contract is partly in writing and partly in parol, *the written part cannot be varied by parol evidence in the absence of fraud, accident, or mistake."*

In

Wigmore on Evidence, Vol. 4, Sec. 2430,

the rule is stated as follows:

> "Sec. 2430. Partial Integration; General Test for applying the Rule; 'Collateral Agreements'. The most usual controversy arises in cases of partial integration, i.e. where a certain part of a transaction has been embodied in a single writing, but another part has been left in some other form. Here obviously the rule against disputing the terms of the document will be applicable to *so much of the transaction as is so embodied, but not to the remainder."* (Italics by the author).

Dean Wigmore then adverts to the difficulty experienced in determining which portions of the contract were intended to be embodied in the writing, and which intended to rest in parol. He calls attention to the fact that the apparent paradox in admitting parol testimony as to the intention of the parties, is apparent only, for the reason that the court should conduct a preliminary investigation to ascertain whether they intended to make an independent agreement on any point not covered by the written instrument, and then admit parol evidence as to the *oral* part of the contract only. The court should carefully exclude all parol evidence as to any element of the negotiations which is dealt with *at all* in the writing. The author's conclusion is stated in the following language:

> "(3) In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the *particular element of the alleged extrinsic negotiation is dealt with at all* in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation. This test is the one used by the most careful judges, and is in contrast with the looser and incorrect inquiry whether the alleged extrinsic negotiation contradicts the terms of the writing." (Italics by the author.)

The rule thus stated by Dean Wigmore is supported by numerous authorities.

In

> *Dickinson Tire & Machine Co. v. Dickinson,* supra, (29 Fed. (2d) 493),

the court applied this rule, and called attention to the difference between using parol evidence to prove the oral

part of such a contract, and using such evidence to contradict the written portion. The language of the court is as follows:

> "The excluded letters and testimony, so far as they prove anything, tend to contradict the terms of the written contract as to advances, *rather than to show that the writing was not intended to embody the whole agreement on that subject. It is elementary that, though the latter may be done, the former may not.*"
>
> (29 Fed. (2d) 495)

The case of

Hope v. Peck, 132 Pac. 344,

decided in the Supreme Court of Oklahoma in 1913, was an action based on certain promissory notes given by the defendant on the purchase of a certain stallion. The defense was based on breach of certain warranties in addition to those contained in the "guarantee contract" executed by the parties. The trial court admitted evidence as to this additional warranty and the breach thereof. The Supreme Court of Oklahoma holds that this evidence should have been excluded, and states the rule as follows:

> "*Where a contract rests partly in parol and partly in writing, that part which is in writing is not to be contradicted by parol evidence.* Holmes v. Evans, 29 Okl. 373, 118 Pac. 144."
>
> (132 Pac. 345)

In

City Messenger & Delivery Co. v. Postal Telegraph Co., 145 Pac. 657,

the Supreme Court of Oregon states the same rule in the following language:

"Where a certain part of a transaction has been embodied in a single writing, but another part has been left in some other form, the rule against disputing the terms of the document *will be applicable to so much of the transaction as is so embodied,* but not to the remainder. 4 Wig. Ev. §2430."

(145 Pac. 659)

In

Lese v. Lamprecht, 89 N. E. 365,

decided by the Court of Appeals of New York in 1909, the question before the court was whether parol evidence could be admitted to prove that the plaintiff had agreed to accept title to certain real estate without previous discharge of a mortgage thereon. The written contract provided for a deed free from all incumbrances. The essential facts, as well as the conclusions of the court, are stated in the following passage:

"The third and fourth findings are each based in a material part upon oral testimony received, subject to objection and exception, to the effect that prior to, and contemporaneous with, the making of the original written contract the plaintiff agreed with the defendant's testator to accept the title to said real property without a previous discharge of the savings bank mortgage thereon, and to retain a sufficient portion of the consideration specified in the contract to pay said mortgage thereafter, and also that prior to and contemporaneous with the making of the further contract adjourning the closing of said title from October 5th to November 3d it was orally agreed that no further adjournment should be granted to the plaintiff, and in substance that the time mentioned in the contract be made of the essence thereof. *We are of the opinion that such testimony was improperly received. The general rule that oral testimony cannot*

be received to vary a written contract is well established and generally conceded. It has become a rule of substantive law. It stands as a bar against using oral testimony to overthrow a solemn and deliberate contract, and arises from the presumption that the parties to a contract by placing their engagement in writing intend to avoid the consequences arising from defects of man's memory and the possibly prejudiced statements of interested witnesses.

"Contracts are frequently made that are collateral to, but independent of, a written contract, and they can be properly established by oral testimony. Evidence of such contracts is sometimes referred to as an exception to said general rule. It is more accurate to say that collateral and independent contracts can be shown by oral testimony, because it was not the intention of the parties thereto to include such contracts in the writing. Collateral contracts are thus frequently established by oral testimony, because they are collateral; and ambiguous written contracts are explained by oral testimony, because they are ambiguous. *The value and integrity of a written instrument is largely dependent upon the fact that it cannot be broken down or modified by a statement of alleged conversations and occurrences leading up to its execution. Where a written contract is clear in its terms, and purports to express the entire arrangement of the parties, and to direct upon all the questions under consideration, it conclusively determines the rights of the parties, and can neither be contradicted, varied, nor explained.* Thomas v. Scutt, 127 N. Y. 133, 27 N. E. 961; Stowell v. Greenwich Ins. Co., 163 N. Y. 298, 57 N. E. 480; Corse v. Peck, 102 N. Y. 513, 7 N. E. 810; Brantingham v. Huff, 174 N. Y. 53, 66 N. E. 620, 95 Am. St. Rep. 545; House v. Walch, 144 N. Y. 418, 39 N. E. 327; Dady v. O'Rourke, 172 N. Y. 447, 65 N. E. 273.

"In deciding whether a particular promise or agreement is collateral and independent of the principal

and written contract it is necessary to determine whether the parties to the written contract intended to include therein all of the promises relating to the subject-matter under consideration. Professor Wigmore, in his work on Evidence, says: 'In deciding upon this intent the chief and most satisfactory index for the judge is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation. This test is the one used by the most careful judges, and is in contrast with the looser and incorrect inquiry whether the alleged extrinsic negotiation contradicts the terms of the writing.' Wigmore on Evidence, Sec. 2430.

"The written contract between the parties now before us provided for a deed free from all incumbrances. It expressly specified one exception to such covenant without including in the written contract a further exception to the effect that the property could be transferred subject to the savings bank mortgage. Again the written contract adjourning the time of closing the title included express agreements binding upon the parties, in connection with the adjournment without expressly making the time to which the closing of title was adjourned of the essence of the contract. *In each case the subject-matter upon which the parties contracted included the matter sought to be established by oral testimony. In each case the subject-matter was within the consideration of the parties in making the written contracts; and, in the absence of fraud, it is conclusively presumed that the contracts as written include an accurate and full statement of the intention of the parties.*"

(89 N. E. 366-7)

In

Miller v. Morine, 149 N. W. 229,

decided in the Supreme Court of Iowa in 1914, the plaintiff sought to recover an installment of rent under a written lease and a rent note. The defendant pleaded, as an affirmative defense, breach of an oral promise to tile the demised premises. Because of this alleged parol agreement, the defendant contended that the contract of lease was partly oral and partly in writing, just as the plaintiff in the instant case contends that the contract of insurance was partly oral and partly in writing. The court finds that the written lease was in ordinary form, was complete in its terms, and was free from ambiguity. Under these circumstances, the ordinary parol evidence rule was applied, and the court dispose of defendant's contention that he had a right to show the parol agreement of the parties because his answer expressly alleges that the contract is partly oral and partly in writing, in the following language:

> "It is urged by the defendant that there was no pleading in the cited cases to the effect that the contract was partly oral and partly in writing, whereas the defendant in the case at bar has expressly pleaded that the contract of lease was partly oral and partly in writing. *But it is no more competent for a party to plead a contract as partly oral and partly in writing than it is to prove it by parol, when the oral part is inconsistent with the written, or ingrafts new undertakings or covenants thereto.*"
>
> (149 N. W. 231)

(c) The Written Application Cannot be Contradicted or Varied by Parol Evidence Even if Hickman Had Powers Broad Enough to Enable Him to Bind the Appellant Company in a Proper Case.

General agents are rare in the insurance business, as will be shown by the authorities cited in a later portion of this brief, but even if Hickman was a general agent, in the sense of having the power to make contracts which would be binding on the appellant before any action was taken at appellant's home office, the parol evidence rule would be an insurmountable barrier to a recovery in the instant case, because of the fact that the conversations and negotiations between Louis A. Yelland and Hickman were ultimately reduced to writing in the application which Yelland signed. The authorities which we have heretofore cited show that the parol evidence rule is "fundamental", "salutary" and "invariable." In other words, it is paramount in all situations which fall within its compass.

In

Union Mutual Life Ins. Co. v. Mowry, supra (96 U. S. 544, 24 L. Ed. 674),

the court makes the following statement:

> "There is nothing in the record which shows that the agent was invested with authority to make an insurance for the Company. * * * *But even if the agent had possessed authority to make an insurance for the Company, and he made the agreement pretended, still the assured was bound by the terms of the policy subsequently executed and accepted by him.*"
>
> (24 L. Ed. 676)

The attention of the court is again called to the statement contained in

Connecticut Fire Ins. Co. v. Buchanan, supra (141 Fed. 877),

where the court said:

> *"It should be observed that in none of the cases to which reference has been made was the decision made to turn upon any limitation upon the authority of the agent,* or otherwise than upon the application of the salutary rule which prevents the subordination of unambiguous written contracts to parol proof of contemporaneous and prior conditions and negotiations. That the rule announced and applied in these cases has been treated by the Supreme Court of the United States as fundamental and invariable is attested by repeated decisions of that court * * *"
>
> (141 Fed. 889)

In

House v. Bankers' Reserve Life Co. of Omaha, Neb., supra (180 N. W. 69),

there was no dispute that Salmons was "state manager"—a title as broad as appellee contends Hickman had in this case—but the court held, nevertheless, that the parol evidence rule, operating on the application signed by House, precluded a recovery, without regard to the powers exercised and enjoyed by a "manager".

In the light of the principles announced in the foregoing cases, it is contended that the appellee is not entitled to recover in this case. The provisions of Paragraph 11 of

the application, reciting that "under no circumstances shall the insurance hereby applied for be in force until * * * delivery of the policy to the applicant *in person, during his lifetime and while in good health,*" stand as an absolute barrier to recovery so long as the parol evidence rule prevails. It is neither alleged nor proved that there was any agreement, made on behalf of appellant by any person having appropriate authority, to strike out these words; and that such agreement had been frustrated by fraud, accident or mutual mistake.

It follows that the District Court erred in permitting Mrs. Yelland to testify, over appellant's objection, that Hickman had agreed that the insurance for which Mr. Yelland applied would be in full force and effect as soon as the application was signed, a note given for the first premium, and the medical examination passed (Tr. 58, 60: VI).

The District Court also erred in failing to sustain appellant's motions to strike this testimony at the time it was given (Tr. 61: VII), at the conclusion of Mrs. Yelland's testimony (Tr. 69: XV), at the close of plaintiff's evidence (Tr. 134-5, 141: LXIX), and at the close of all the evidence (Tr. 247-8: CXI).

The District Court also erred in its instructions to the jury in this regard, but that will be taken up at another place in this brief.

(2) THE DISTRICT COURT ERRED (a) IN OVERRULING APPELLANT'S DEMURRER TO APPELLEE'S AMENDED REPLY; (b) IN DENYING APPELLANT'S MOTION FOR JUDGMENT ON THE PLEADINGS; (c) IN OVERRULING APPELLANT'S OBJECTION TO THE INTRODUCTION OF ANY EVIDENCE; (d) IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S EVIDENCE; (e) IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE; AND (f) IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT.

In Paragraph V of appellee's amended complaint it is alleged that on November 20, 1926, "Louis A. Yelland signed a written application of the said defendant company for insurance upon his life." (Tr. 4). Appellant's answer admits this allegation (Tr. 15), and sets up, as new matter, the provisions of Paragraph 11 of the application, reading as follows: "It is agreed on behalf of myself and of any person or persons who may have or claim any interest in any policy that may be issued under this application * * * that under no circumstances shall the insurance hereby applied for be in force until * * * delivery of the policy to the applicant in person, during his lifetime and while in good health" (Tr. 21-2). Appellee's amended reply admitted this allegation of the answer, and alleged, by way of avoidance, that it was waived by virtue of Hickman's alleged agreement that "said contract of insurance should be in full force and effect and binding upon said defendant company as soon as the said Yelland successfully passed the medical examination given by Dr. M. J. Rand as alleged in paragraph 5 of said

amended complaint, that if the said Yelland died at any time thereafter his beneficiary to said contract of insurance, the plaintiff herein, would be entitled to the full insurance provided for in said contract of insurance.'' (Tr. 43-4). Appellant demurred generally to this reply (Tr. 47-8). The pleadings also admitted that no policy was ever issued, or delivered in accordance with the provisions of paragraph 11 of the application.

These allegations of the several pleadings presented a case squarely within the embrace of the parol evidence rule. They showed that appellee was not entitled to recover any sum from appellant because or on account of the negotiations which had been held between Hickman and Louis A. Yelland.

Appellant did not forfeit its right to question the order of the District Court overruling the demurrer to the amended reply, by defending at the trial of the case.

In

Gardner v. Gardner, 23 Nev. 207,

the Supreme Court of Nevada ruled on this point as follows:

> ''All objections to a complaint are waived by answering and raising issues of fact, except: (1) 'That the court has no jurisdiction of the person of the defendant or the subject of the action.' (2) *'That the complaint does not state facts sufficient to constitute a cause of action.'* ''
>
> (23 Nev. 211-2)

The same rule was stated in

Lonkey v. Wells, 16 Nev. 271

where the Supreme Court of Nevada made the following statement:

> "The general rule seems to be well settled, as stated by Bliss in his work on code pleading, that 'if the demurrant wishes to take advantage of any supposed error in overruling the demurrer, he must let final judgment be entered upon it; for, if he shall answer, after such ruling, he waives any objection to it, *except for the two radical defects.*' "
>
> (16 Nev. 275)

And the rule is also stated in

Hardin v. Elkus, 24 Nev. 329,

where the Supreme Court of Nevada says:

> " 'The general rule seems to be well settled,' as stated by Bliss in his work on Code Pleading (sec. 417), 'that, if the demurrant wishes to take advantage of any supposed error in overruling the demurrer, he must let final judgment be entered upon it, for, if he shall answer, after such ruling, he waives any objection to it, *except the two radical defects.*' "
>
> (24 Nev. 334)

It is therefore contended that the District Court erred:

(a) In overruling appellant's demurrer to appellee's amended reply (Tr. 47-8, 42: Additional Assignment of Error III);

(b) In denying appellant's motion for judgment in its favor on the pleadings (Tr. 55-6: III);

(c) In overruling appellant's objection to the introduction of any evidence, said objection having been made on

the ground that appellee's amended complaint did not state a sufficient cause of action (Tr. 57: V);

(d) In denying appellant's motion for a directed verdict at the close of plaintiff's evidence (Tr. 141-2, paragraphs b, c, d and i: LXXX, parts 2, 3, 4, and 9);

(e) In denying appellant's motion for a directed verdict at the close of all the evidence (Tr. 250-1: CXV); and

(f) In entering judgment in favor of the plaintiff and against the defendant (Tr. 51-3: I).

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(3) THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE AS TO DECLARATIONS AND STATEMENTS OF HICKMAN AND ROBISON RELATIVE TO HICKMAN'S POWERS AND AUTHORITY, THE SIGN ON THE DOOR OF HICKMAN'S OFFICE, THE BUSINESS CARDS, LETTERHEADS, ENVELOPES AND SOUVENIR EYE SHADES USED BY HIM, AND THE CAPTION ON THE PUBLICATION OF APPELLANT'S ANNUAL STATEMENTS, FOR THE REASON THAT:

(a) The Fact or Extent of Agency Cannot Be Proved by the Acts, Declarations and Statements of the Agent, Unless the Principal Knows of or Assents to Them.

The rule that neither the fact nor the extent of agency may be proved by the acts, declarations or statements of the agent is almost as well established as the rule that written agreements may not be contradicted or varied by parol evidence.

In

"Agency," 2 Corpus Juris 945, Sec. 709,

the rule is stated as follows:

> *"As a general rule the fact of agency, or the extent and scope thereof, cannot be established by*

proof of the acts of the pretended agent, in the absence of evidence tending to show the principal's knowledge of such acts, or assent to them.''

In

Mechem on Agency (2d Edition), Sec. 285,

the rule is stated thus:

> ''The authority of an agent, *and its nature and extent where these questions are directly involved,* can only be established by tracing it to its source in some word or act of the alleged principal. The agent certainly cannot confer authority upon himself or make himself agent merely by saying that he is one. Evidence of his own statements, declarations or admissions, made out of court therefore (as distinguished from his *testimony* as a witness), is not admissible against his principal for the purpose of establishing, *enlarging* or renewing his authority; nor can his authority be established by showing that he acted as agent or that he *claimed to have the powers which he assumed to exercise* * * * ''

This principle has been repeatedly recognized and applied by the courts.

Thus, in

Walker v. W. T. Rawleigh Co., 271 Pac. 166,

decided in the Supreme Court of Oklahoma in 1928, the court says:

> ''The rule that agency cannot be proved by the acts or declarations of the alleged agent is so well established that it requires no citations in support thereof.''
>
> (271 Pac. 167)

In

Raymond v. National Life Ins. Co., 273 Pac. 667,

decided in the Supreme Court of Wyoming in 1929, the court says:

> "It is elementary law that the scope of an agent's authority cannot be proven merely by the agent's acts, representations, declarations or admissions, and also that it is the duty of all who deal with him in his representative capacity to inquire into the extent of that authority * * * "
>
> (273 Pac. 671)

In

Rigler v. North Dakota Const. Co., 220 N. W. 441,

decided in the Supreme Court of North Dakota in 1928, the rule is tersely stated as follows:

> "It is well settled that agency cannot be proved by the declarations of the agent."
>
> (220 N. W. 442)

In

Finney v. Stanfield Fraternal Assn., 283 Pac. 415,

decided in the Supreme Court of Oregon in 1929, the court states the rule as follows:

> "An agency cannot be established by the declaration of the agent."
>
> (283 Pac. 417)

In

Moore v. Switzer, 239 Pac. 874,

decided in the Supreme Court of Colorado in 1925, the court makes the following statement:

> "The court was also wrong in admitting evidence of what Potter said as to his powers, because it

is elementary that the declarations of an agent cannot be used to show his own authority."

(239 Pac. 876)

In

Ramsey v. Wellington Co., 235 Pac. 297,

decided in the Supreme Court of Oregon in 1925, the court states the rule as follows:

"The declarations of an agent as to the fact *or extent* of his authority are not competent to prove his agency."

(235 Pac. 301)

The rule that the declarations and statements of the agent may not be used for the purpose of proving either the fact or extent of his agency applies with particular force in any case where the agent's powers are derived from a written authorization. In such case the written instrument must be resorted to when the power of the agent to do any particular act, or to make any particular agreement, is denied by the principal, or otherwise brought in question.

In

Mechem on Agency (2d Edition), Sec. 285, supra,

the author makes the following statement:

"Where his authority is in writing he cannot extend its scope by his own declarations."

And in Section 764 of the same work, the author says:

"An authority having been conferred and an attempt made to exercise it, it becomes important to determine whether the act assumed to be done by virtue of the given power is, in reality, embraced

within it. This leads to the necessity of construction or interpretation of the authority.

"In the main, the principles governing the construction of a power do not differ from those which prevail in regard to the interpretation of contracts generally."

Where agents act under written instruments, the parol evidence rule is applicable the same as in the case of other classes of written contracts. In such cases the rule, stated by Professor Mechem, is as follows:

"In general, parol evidence is not admissible for the purpose of enlarging or extending the powers conferred by the written instrument, and the nature and extent of the authority must be ascertained from the instrument itself * * * "

(*Mechem on Agency,* 2d Ed., Sec. 774)

It has been held in a number of cases that these general principles of agency are applicable to the powers of insurance agents.

Thus, in

Fisk v. Liverpool & London & Globe Ins. Co., Limited, 164 N. W. 522,

decided in the Supreme Court of Michigan in 1917, the court says:

"*It is elementary that the powers possessed by agents of insurance companies, like those of agents of any other corporations, are not governed by any individual principle, but are to be interpreted in accordance with the general law of agency.* A different view may not be applied to a contract of insurance than is applied to other contracts. Quinlan v. Insurance Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645.

> "Generally it may be said that agency cannot be proved by the statements, declarations, or admissions of the agent made out of court, but must be established by tracing its source to some word or act of the alleged principal (Mechem on Agency, 2d Ed. Sec. 285) * * * "

And, in

Quinlan v. Providence Washington Ins. Co., 31 N. E. 31,

decided in the Court of Appeals of New York in 1892, the court made the following statement:

> "The powers possessed by agents of insurance companies, like those of agents of any other corporations, or of an individual principal, are to be interpreted in accordance with the general law of agency. No other or different rule is to be applied to a contract of insurance than is applied to other contracts."
>
> (31 N. E. 33)

The rule is summarized in

"Insurance," 32 Corpus Juris 1063, Sec. 139,

as follows:

> "The rules of construction which govern in determining the scope and extent of the authority of agents in general apply in determining the authority of an insurance agent."

(b) An Agent's Business Cards, Letterheads, Envelopes, etc., are Not Competent Proof of Either the Fact or Extent of His Authority.

An agent's business stationery, such as cards, letterheads, etc., cannot be relied on for the purpose of proving the agent's authority. The courts have regarded

these things as being in the same category with the agent's oral statements relative to the fact or extent of his authority.

In

"Agency," 2 Corpus Juris 939, Sec. 693,

the rule on this point is stated as follows:

> "The general rule applies equally to oral statements of the agent, and to written statements contained in letters, letter heads, receipts, or other documents, implying, admitting, or claiming authority to act as agents in the negotiations with the third person."

In

Mechem on Agency (2d Edition), Sec. 285, supra,

the author makes the following statement:

> "* * * His [the agent's] written statement and admissions are as objectionable as his oral ones, and his letters, telegrams, advertisements and other writings cannot be used as evidence of his agency * * * "

The question of the value of business cards as evidence of the agent's authority to bind his principal, by an act which was in fact unauthorized, was passed on by the Supreme Court of Nevada in

Jos. Schlitz Brewing Co. v. Grimmon, 81 Pac. 43.

In that case an action was brought by the brewing company to recover the value of certain beer barrels and kegs. One Ecker had been in the saloon business in Reno; and when his financial affairs became tangled, one Branton was appointed to act as trustee for the

benefit of Ecker's creditors. The defendant, Grimmon, was requested to buy the beer which Ecker had on hand at the time. Grimmon refused to buy the beer, unless allowed to buy the barrels and kegs as well, so Branton got in touch with A. G. Shape, the plaintiff's agent, for the purpose of ascertaining whether the barrels and kegs might be sold along with the beer. Shape told Branton that plaintiff had no claim on the cooperage, and no agreement with Ecker by which it could be recovered. Plaintiff repudiates Shape's statement, and defendant relies on Shape's apparent authority to bind plaintiff. As evidence of this authority defendant introduced certain business cards which Shape had been in the habit of using.

The court held that the use of such cards is not evidence of Shape's authority. The language of the court is as follows:

> "Shape presented cards bearing near the top the trade-mark of the Schlitz Brewing Company and the motto, 'The Beer that Made Milwaukee Famous'; at the center, 'A. G. Shape'; and near the bottom, 'With Jos. Schlitz Brewing Co., Milwaukee, Wis.' These and the testimony were admitted over objections * * *
>
> "Branton testified that, as assignee, he sold the barrels to defendant because Shape had represented himself as the agent of the company, and he supposed he was authoried, and had said that the plaintiff had no claim upon them, and no agreement with Ecker by which they could be recovered. Such assertions by Shape, his representations, and assumption of authority, *the production of cards bearing his name in connection with that of the company,*

> *and its trade-mark and motto,* his statement that he would telegraph to the plaintiff, and later to King that it was all right, and his making out a bill to the assignee for a part of the cooperage, may have lured and deceived the defendant; *but, unless these acts were in some way authorized or ratified by the plaintiff, they would not bind it or deprive it of its property.*"

The case of

> *United States Smelting, Refining & Mining Exploration Co., et al. v. Wallapai Mining & Development Co.,* 230 Pac. 1109,

decided in the Supreme Court of Arizona in 1924, was an action brought to recover damages for injury to plaintiff's property during defendant's use and occupancy of it. Plaintiff's right to be recompensed for the injuries to his property was based on a written contract between the plaintiff and one Anderson. While the point does not appear with certainty, it seems that Anderson was, in fact, general manager for the defendant mining company. Anderson's authority to execute the particular contract being questioned by the mining company, the plaintiff offered in evidence certain letters written by Anderson on the company's letterhead, as proof of Anderson's authority to bind the defendant.

The court holds that such evidence is not competent for that purpose. The language of the court is as follows:

> "Over objection, many letters written by Anderson and other employees of the Exploration Company and the Mining Company, bearing the letter heads of defendant Exploration Company, were introduced, not that their contents had any bearing upon the

issue of agency, but upon the theory that the letter heads themselves were evidence of Anderson's agency. There were also two letters on the letter heads of the Mining Company introduced, but they were written subsequent to December 14, 1917, the date the Tennessee group of mines were surrendered to the plaintiff.

"*These letter heads were not competent evidence of such agency and the court erred in admitting them for that purpose. The rule is well established, not only in this state, but elsewhere, that the declarations of an alleged agent are not evidence of the fact of agency, nor the extent thereof.*

" 'The agency must be proved by other evidence before his (the agent's) acts and statements can be shown against the principal. At best such declarations are mere hearsay. *The rule applies equally to oral statements of the agent and the written statements, contained in letters, letter heads, receipts, or other documents implying, admitting, or claiming authority to act as agent in the negotiations with the third person.*' 31 Cyc. 1652."

(230 Pac. 1110)

In this case the record contains evidence, admitted over the objection and exception of appellant, that Hickman had caused the company's annual statement to be published, pursuant to the statutes of Utah, in the Salt Lake Tribune. This publication was made under a heading, or caption, which described Hickman as appellant's intermountain manager. Hickman testified that he was not directed to make this publication, but merely "given the privilege" of doing so; that the substance thereof was taken from appellant's official report filed directly by appellant in the office of the Insurance Commissioner

of the State of Utah, and not from any materials supplied directly to Hickman, and that he placed the caption on the published statement himself, without direction or authority of any sort from appellant's home office. Apparently, this evidence was offered for the purpose of proving, by means of such heading or caption, that Hickman was appellant's intermountain manager.

That such newspaper publications have no probative value, and are not admissible for the purpose of proving the agent's authority, was decided by the Supreme Court of Iowa in

Joseph Schlitz Brewing Co. v. Barlow, 77 N. W. 1031,

where, in an action to recover the value of fixtures belonging to the plaintiff, which had been seized by the defendant as sheriff, the court says:

> "There is no controversy but that the plaintiff owned the fixtures in question when they were loaned to Martz and Meier. As the loan was made by Silvers & Co., it became necessary to show that the company had authority so to do, and there was an effort to do so by showing that Silvers & Co. was the agent of the plaintiff. The court, by an instruction, made the defense rest on the facts that Silvers & Co. was the agent of plaintiff, and knew that Martz & Meier was using the property in violation of law. In the Sigourney Courier, a newspaper, was published December 17, 1895, the following: 'W. V. Silvers & Co., dealers in wines and liquors. Agents for Jos. Schlitz' Milwaukee beer. Office 309 East Main Street, Ottumwa, Iowa. Send for prices.' This was permitted in evidence, against objections, to prove the agency of Silvers & Co. It in no way appears that plaintiff caused or knew of

> such publication. It was error to admit it in evidence. If it be conceded that it was published *by authority of Silvers & Co., it could be no better as evidence than if it was a statement by Silvers & Co. that it was such agent, and such statement would not be permissible, under the rule that an agent's declarations are not admissible to show the fact of his agency.* Clanton v. Railway Co., 67 Iowa 350, 25 N. W. 277; Bigler v. Toy, 68 Iowa 687, 28 N. W. 17. The rule is elementary."
>
> (77 N. W. 1032)

The rule laid down by the Iowa court is applicable to the publication of appellant's annual report in this case, notwithstanding the testimony of Hickman that he sent copies of the newspaper publication to appellant's home office. There is nothing in the record of this case to show that they ever came to the attention of appellant's board of directors, or to the attention of any executive officer. These newspaper clippings may very well have been received and filed away, as routine matters, by mere clerks; and in the absence of proof of any circumstance that would have called to the attention of the responsible heads of appellant company that the statements published in the Salt Lake Daily Tribune carried a heading or caption not required by the statute under which such publication was made, and not included in the official report which was the source of the substance of the published statement, it is contended that Hickman's evidence furnishes a very flimsy foundation for holding that appellant was informed in this way of the fact that Hickman was thus holding himself out as intermountain manager.

In connection with this point it should be remembered that Hickman was appellee's witness in giving this testimony, as it is embraced in the part of his deposition read in evidence on the plaintiff's case (Tr. 99). Under the authorities hereinafter cited, the burden of proof of agency was on appellee, and it is urged on behalf of appellant that this burden is not thus easily discharged.

Furthermore, this proof will not suffice to establish apparent or ostensible authority as Intermountain Manager, for the reason that there is not a syllable of evidence to show that Louis Yelland had any knowledge of the heading or caption of these publications, and that he relied on them as proof that Hickman was intermountain manager. In a later portion of this brief we will show that where it is sought to bind a principal on the ground that the agent had ostensible, if not actual, authority to do the act or make the agreement in question, it must be proved that the acts or conduct of the agent, on which the claim of ostensible authority is based, were known to both the principal and the person with whom the agent deals, and were relied on by the latter.

In this case appellee also faces the difficulty that even if she had brought forward competent and convincing proof that Hickman had either actual or ostensible authority to act as intermountain manager, she would not yet have shown that he had power to waive the provisions of the application which Louis Yelland signed, and this without regard to the parol evidence rule. In a later part of this brief authority will be cited to show

that a "manager" has no power to make an oral contract of life insurance that will be binding on the company he represents.

(c) One Dealing With an Agent is Bound to Inquire as to Both the Fact and the Extent of Agent's Authority, and Where Either is Questioned, Must Assume the Burden of Proof with Reference Thereto.

The courts have repeatedly held that one who deals with an agent may not deliberately close his eyes and rely on the statements of the agent, either as to the fact or the extent of his agency. The mere fact that one purports to act as the agent of another, it has been held, puts the person dealing with the agent on inquiry, and he is bound, at his peril, to ascertain all facts relative to the agency that would be disclosed by reasonable investigation.

In

Maryland Casualty Co. v. City of Cincinnati, 291 Fed. 825,

decided in the United States District Court for the District of Ohio in 1923, the court makes the following statement:

> "That a principal is bound by the acts of his agent within the scope of such authority as he has or is held out by his principal to have: that all words and acts brought home to the principal may be considered to determine the extent of that authority; that beyond the extent thereof so determined the principal is not bound; *and that one who deals with the agent of another is bound to take notice thereof, and, when the authority is denied, bears the burden*

of proof to show it—are propositions firmly established. Mechem on Agency, Sec. 743."

(291 Fed. 828)

In

Mechem on Agency (2d Edition), Sec. 743,

to which reference is made in *Maryland Casualty Co. v. City of Cincinnati,* supra, the author states the rule thus:

"*Person dealing with agent must ascertain his authority.*—In approaching the consideration of the inquiry whether an assumed authority exists in a given case, there are certain fundamental principles which must not be overlooked. Among these are, as has been seen, (1) that the law indulges in no bare presumptions that an agency exists: it must be proved or presumed from facts; (2) that the agent cannot establish his own authority, either by his representations or by assuming to exercise it; (3) that an authority cannot be established by mere rumor or general reputation; (4) that even a general authority is not an unlimited one; and (5) that every authority must find its ultimate source in some act or omission of the principal. An assumption of authority to act as an agent for another of itself challenges inquiry. Like a railroad crossing, it should be in itself a sign of danger and suggest the duty to 'stop, look and listen.' It is therefore declared to be a fundamental rule, *never to be lost sight of and not easily to be overestimated,* that persons dealing with an assumed agent, *whether the assumed agency be a general or special one,* are bound at their peril, if they would hold the principal, to ascertain *not only the fact of the agency but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it.*"

And in Sec. 298 the author again states the rule relative to the burden of proof as follows:

> "Burden of proof—As has already been stated, the burden of proving agency, including not only the fact of its existence, *but its nature and extent,* rests ordinarily upon the party who alleges it."

These principles have been applied repeatedly by the courts, both federal and state.

In

Richmond Guano Co. v. E. I. du Pont de Nemours & Co., 284 Fed. 803,

decided by the United States Circuit Court of Appeals for the Fourth Circuit in 1922, the rule is stated thus:

> "It is elementary that those who deal with agents must ascertain at their peril the scope of the agency."

In

Brutinel v. Nygren, 17 Ariz. 491, 154 Pac. 1042,

decided in the Supreme Court of Arizona in 1910, the following statement appears:

> "The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal, and like a railroad crossing suggests the duty to 'stop, look and listen,' and if he would bind the principal is bound to ascertain, not only the fact of agency, *but the nature and extent of the authority,* and in case either is controverted the burden of proof is upon him to establish it. In fine, he must exercise due care and caution in the premises."
>
> (154 Pac. 1045-6)

In

Jos. Schlitz Brewing Co. v. Grimmon, supra (81 Pac. 43),

the same rule was adopted by the Supreme Court of Nevada. In that case, the court says:

> "It would seem that the district court, in effect, assumed that, by sending Shape forth to solicit orders for beer, it became bound by anything else he might do in connection with its affairs. As it is not shown that Shape had any general authority to act for the company, or that he was empowered to waive its right to the cooperage, or that his acts were ratified, his declarations were merely hearsay, and, however much the defendant may have been lured into relying upon them, they did not affect the rights of the plaintiff * * * *If the defendant had wired to the plaintiff before closing the deal, or required Shape to show a telegram or some written authorization, instead of trusting in Shape, any trouble might have been avoided.*"
>
> (81 Pac. 46)

In

Raymond v. National Life Ins. Co., supra (273 Pac. 667),

the Supreme Court of Wyoming stated the rule in the following language:

> "The first contention of applicant [sic] to be examined in the light of these principles is that the soliciting agent of the defendant, Williams, and its local medical examiner, Dr. Replogle, were authorized to make, and did make, a lawful and binding insurance contract with Raymond on September 26, 1926—the day the application was signed and the medical examination made. There are several mat-

> ters which, upon due consideration, we think, establish that this contention is untenable: First, there is nothing in the record before us * * * which shows that either the soliciting agent or the medical examiner at Lander possessed any unusual powers as regards making an insurance contract with the defendant. It is elementary law that the scope of an agent's authority cannot be proven merely by the agent's acts, representations, declarations or admissions, *and also that it is the duty of all who deal with him in his representative capacity to inquire into the extent of that authority* * * * ''
>
> (273 Pac. 671)

In

> *Missouri State Life Ins. Co. v. Boles,* supra (288 S. W. 271),

the court held that the burden of proving the agent's authority was on the plaintiff. The language is as follows:

> "So far as concerns the oral contract declared upon in the first count, the judgment cannot be sustained thereunder, for the evidence is insufficient to show that the agent, Goldthwaite, undertook to make a contract of that nature; and, if upon any theory of the evidence it could be held that he did undertake so to do, then there is a complete want of evidence to show his authority to make same. He was a mere soliciting agent, and such an agent has no implied authority to consummate a contract of insurance. 32 C. J. 1066. *The burden rested upon appellee to show the agent's authority to make the contract declared upon.''*
>
> (288 S. W. 273)

This rule is a reasonable one, in view of the fact that it is much simpler for one who deals with an agent to

seek out the source and extent of his agency, than it is for the principal to follow the agent about in order that everyone may be warned as to the limitations which have been placed on the agent's authority.

In connection with the principles announced in these authorities, the attention of the court is called to the fact that appellee admitted that neither she nor Louis Yelland made any investigation of the powers and authority of Hickman, and that they knew nothing with reference thereto, except what Hickman himself told them (Tr. 67).

The courts have held that it is not necessary for a principal to suspect that his agent will violate his authority and undertake to do things which are beyond the scope of his actual powers.

In

Richmond Guano Co. v. E. I. du Pont de Nemours & Co., supra (284 Fed. 803),

this rule is stated as follows:

> "There was no duty on plaintiff to suspect Tredwell, and defendants had no right to demand that plaintiff should keep a watch over him or check his transactions to see that he did not act beyond the scope of his agency * * * But no authority has been cited and we have been able to find no authority or reason supporting the proposition that a principal who discovers that his agent has undertaken to act beyond the scope of his authority in two or three transactions is under obligation to the public at large or to any individual to institute prompt and thorough examination of all his transactions in a very large business to discover other unauthorized dealings, for the protection of those who have

> chosen to deal with the agent without ascertaining the scope of the agency. *Diligence to ascertain if an agent is exceeding his authority devolves on those who deal with him, not on his principal.''*
>
> (284 Fed. 808-9)

And in

''Agency,'' 2 Corpus Juris 480, Sec. 97,

the rule is stated as follows:

> ''In the absence of circumstances sufficient to put a man of reasonable prudence on inquiry, no duty rests upon a principal to make any effort to discover whether another is doing unauthorized acts in his name, *and he may assume, until otherwise advised, that his agent will act within the scope of his authority* * * * ''

(d) Such Evidence Did Not Constitute Legal Proof of Ostensible Agency or Authority by Estoppel.

While it is no doubt true that in a proper case a principal may be bound by the unauthorized act of his agent, this result is accomplished only in those cases where the principal has ratified the unauthorized act, or the agent has apparent or ostensible authority to do the thing in question, or the circumstances of the case are such that, for the purpose of preventing injustice, the courts will regard the principal as being estopped to deny the authority of his agent.

In this case there is no question of ratification. It is not raised by the pleadings; it is not supported by the evidence. Mr. Yelland died before the application and medical report reached appellant's home office. The first action taken by appellant on the application was

to reject it, because it had learned that Yelland was dead. Under these circumstances, there can be no suggestion that appellee is entitled to recover under any theory of ratification.

Nor is the doctrine of estoppel (as distinguished from apparent or ostensible authority) available to appellee. The position taken by appellant in denying that any contract of insurance was in existence at the time of Yelland's death, does not result in any hardship or injustice to appellee. There is no evidence in the record to show that on the occasion when Hickman took Yelland's written application for insurance on the alleged promise that such insurance would be effective practically immediately, other insurance agents were present who would have been willing to insure him under the conditions set forth in appellee's complaint. There is nothing to show that Yelland was prevented from obtaining other insurance because of the promises attributed to Hickman.

The evidence is undisputed that appellant never received one penny of the premium on the insurance for which Yelland applied. Nothing has come into the hands of appellant that was not restored to appellee immediately upon receipt of the inspection report, required by appellant before action could be taken upon the application. The only thing Yelland parted with, because or on account of this application, was his promissory note. The evidence shows that Mr. Preston, Vice-President and Chairman of the Executive Committee of appellant company, wrote to Hickman on December 10, 1926, in-

structing him to forward the premium note to appellant's home office at once. The undisputed evidence also shows that on December 20, 1926, Mr. Preston mailed that note to Mrs. Yelland, in a letter in which he stated that the application had been rejected because Mr. Yelland died before action could be taken in the regular course of the company's business. It therefore appears that within the brief space of ten days, appellant's instructions to Hickman travelled from Omaha to Salt Lake City, and were there considered by him (for a period of time which does not appear from the record), the note was sent back to Omaha, and it was there promptly mailed to Mrs. Yelland.

No injustice to appellee, nor any hardship upon her, appears from these circumstances. She has been deprived of nothing that she might have had if the alleged promise of Hickman had never been made. Appellant has not been unjustly enriched by reason of anything which it has received and retained.

This leaves for consideration the question whether Hickman possessed apparent or ostensible authority to bind appellant by the alleged promise that the Yelland insurance would be effective under the circumstances alleged in the amended complaint.

Even if the parol evidence rule did not dispose of this question, in view of the fact that the application signed by Yelland contained the provision that the insurance would not be effective unless and until the policy was actually issued by the company, and delivered to him in person, during his lifetime and while in good health, the

evidence as to the statements and declarations of Hickman relative to his own authority, and the evidence as to the business cards, envelopes, letter heads and souvenir eye shades used by him in the course of his business, and the sign on his office door in Salt Lake City, are not sufficient proof of apparent or ostensible authority to bind appellant in this case. The rule has been laid down by the courts that no liability will be imposed on a principal for the unauthorized acts of his agent, unless the facts and circumstances upon which apparent or ostensible authority is predicated were known to, and were relied upon by, the person alleging such ostensible authority, and unless those facts and circumstances were also known to the principal. In this case the facts and circumstances upon which the claim of ostensible authority is based must be shown to have been known to Yelland, and relied upon by him in his dealings with Hickman.

In

"*Agency*", 2 Corpus Juris 573-5, Secs. 212-215,

the rule is stated thus:

> "(2) Apparent or Ostensible Authority. Apparent authority in an agent is such authority as the *principal* knowingly permits the agent to assume or which he holds the agent out as possessing; such authority as he appears to have by reason of the actual authority which he has; such authority as a reasonably prudent man, *using diligence and discretion,* in view of the *principal's conduct* would naturally suppose the agent to possess.
>
> "Ostensible authority is such authority as a *principal* intentionally or by want of ordinary care causes or allows a third person to believe the agent to possess, and in some jurisdictions it is so defined by

statute. Ostensible authority to act as agent may be conferred if the *principal* affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to *act on* an apparent agency.

"(3) Elements of Rule. *It is essential to the application of the above general rule that two important facts be clearly established: (1) That the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority; and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority.*

"(4) Acts of Principal Control. *The apparent power of an agent is to be determined by the acts of the principal and not by the acts of the agent; a principal is responsible for the acts of an agent within his apparent authority only where the principal himself by his acts or conduct has clothed the agent with the appearance of authority, and not where the agent's own conduct has created the apparent authority.* The liability of the principal is determined in any particular case, however, not merely by what was the apparent authority of the agent, but by what authority the third person, *exercising reasonable care and prudence,* was justified in believing that the principal had by *his acts* under the circumstances conferred upon his agent.

(5) Knowledge and Good Faith of Third Person. *It is also necessary to the application of the above general rule that the person dealing with the agent was aware of the principal's acts from which the apparent authority is deduced, and that he dealt with the agent in reliance thereon, in good faith, and in the exercise of reasonable prudence.*"

In connection with the requirement that one dealing with an agent must act in good faith, and must exercise

reasonable diligence to ascertain the real nature and scope of the agent's authority, we wish to call attention to the testimony that Hickman was "introduced" to Yelland by Robison on November 18, 1926 (Tr. 58); that Mrs. Yelland met Hickman for the first time that day (Tr. 57-8); that neither she nor Mr. Yelland made any investigation of Hickman's agency, before the application was signed, and that they knew nothing relative thereto, except what Hickman himself told them (Tr. 67).

What will constitute diligence and good faith depends on the circumstances of each case. Where the authority asserted by the agent is of a character that one might reasonably expect him to possess, it is obvious that the person dealing with him will not be required to exercise as much diligence in ascertaining the real scope of his authority as would be expected in a case where he asserts the power and authority to do that which is unusual or unreasonable. Authority to make an oral contract of life insurance is certainly unusual.

In

Francis v. Mutual Life Ins. Co., of New York, supra, (106 Pac. 323),

the Supreme Court of Oregon said:

> "The cases cited by counsel for plaintiff are cases arising out of claims for fire insurance, where, by custom, local agents are permitted to issue temporary policies and assume temporary risks, even without policies. *No well-considered case can be found where the same rule has been applied to life insurance.*"
>
> (106 Pac. 327.)

In

McDonald v. Equitable Life Assur. Soc., 169 N. W. 353,

decided in the Supreme Court of Iowa in 1918, the court says:

> "Life insurance agents are rarely, if ever, 'general' in the sense that they execute and deliver policies as is often done in the business of fire insurance; * * *."
> (169 N. W. 359)

In

Mechem on Agency, (2d Edition), Sec. 1050,

the author classifies insurance agents, and describes the powers and authority which they enjoy, in the following statement:

> "There is in the insurance business a variety of agents having one particular function to perform and deriving their special name from that function:—thus there is the appraiser, the adjuster, the medical examiner, etc., but these are not here to be considered. Apart from these, insurance agents as a whole may be roughly divided into two classes: 1. Issuing agents; 2. Soliciting agents. It is the scope of the authority of these agents that will be considered here.
>
> "1. The issuing agent, *usually of a fire or casualty company,* is an agent who is given express authority to accept risks, agree upon the terms of insurance, and carry them into effect by issuing and renewing policies * * *."
>
> "2. The soliciting agent, often called a special agent, *usually of a life insurance company,* is an agent *who usually has no authority to make a binding contract, but who merely solicits applications for insurance and forwards them to be passed upon at*

> *the office of his company.* In addition he often countersigns the policy if issued, delivers it and collects the premium."

And in Section 1055, he deals with the authority of insurance agents to make oral contracts. His language is as follows:

> "Since, in the absence of a statute to the contrary, there is no requirement that contracts of insurance shall be in writing, a general agent, *with authority to himself issue a policy,* may, it is held, make either a valid oral contract of present insurance, certainly a temporary and provisional one, or an oral contract to issue a policy.
>
> *"But a mere soliciting agent, not being authorized to make binding contracts of any kind, has no such authority."*

These citations show that the authority which Hickman pretended to have, if he made the promises which appellee alleges, was unusual or improbable, and it was therefore necessary for Yelland to exercise diligence in tracing the asserted authority back to some word or act of appellant. This was not done. No inquiry was made.

Although the complaint alleges that Hickman made a practice or custom of representing to actual or prospective patrons that insurance would be effective on signing an application, paying the first premium, and passing the medical examination, there is no evidence that he ever made any such statement to anyone other than Louis Yelland, Steven Doutre and Arthur Yelland. It is not shown that his statement to any of these witnesses was ever brought to the knowledge of appellant; nor that

Louis Yelland ever knew or heard of the statements said to have been made to Steven Doutre or Arthur Yelland.

The allegation in appellee's complaint that Hickman had obtained many profitable contracts of insurance by reason of such promises and representations (Tr. 3), is wholly unsupported by the evidence. There is no evidence that either Doutre or Arthur Yelland made application for insurance with appellant. The Louis Yelland application is the only one shown to have been obtained by Hickman under such circumstances.

The rule that the acts or circumstances upon which apparent or ostensible authority is predicated, must be known both to the principal and to the person claiming the existence of such authority, is established by numerous decisions of the courts.

In

> *Richmond Guano Co. v. E. I. du Pont de Nemours & Co.,* supra (284 Fed. 803),

the court refused to accept as proof of ostensible authority, testimony showing similar previous conduct of the agent, because such conduct was not known to the defendant who had alleged the existence of such authority. The language of the court is as follows:

> "Three sales to the Trotman Company are also relied on, *but these sales like the others were not known to any of the other defendants and could not have misled them.*"
>
> (284 Fed. 807)

The same rule is laid down in the California case of *Pacific States Corporation v. Gill,* 206 Pac. 489, where the California Court of Appeals makes the following statement:

> "Indeed, it is to be stated that, if the defendants had rested their case upon the theory of ostensible agency, *it is clear that a vast amount of the testimony offered in support of that claim would be wholly irrelevant and incompetent,* since many of the circumstances which were brought out by the evidence at the trial occurred subsequently to the date of the purchase of the first lot of cattle by the Gill Bros. from Loughery, and some occurred even after the date in February, 1916, when the second lot of cattle was likewise purchased. For this reason alone, upon the theory of ostensible agency, a reversal would be required, *for there is no evidence showing or tending to show that at the time the purchases of the cattle were made the defendants had any knowledge of those few circumstances which occurred before the sales and which might otherwise be held to be competent as tending to establish ostensible agency.*"
>
> (206 Pac. 492)

In connection with the suggestion of the California court, in the case last cited, that acts of the agent subsequent to his dealings with the defendants were no proper evidence of ostensible agency, attention is called to the fact that Hickman's conversations with Doutre and Arthur Yelland were subsequent to the date when Louis Yelland signed his application. Doutre testified that Hickman told him that he *had* insured Louis Yelland, and expected to insure Robison (Tr. 123); and Arthur Yelland testified that Hickman offered to sell him a policy "on the

same condition that he had *already* made with my brother Louis Yelland'' (Tr. 127), and also that Hickman said that he had sold Louis Yelland a policy *''the day before''* (Tr. 128).

In

Cauger v. Gray Motor Co., 217 N. W. 347,

decided in the Supreme Court of Minnesota in 1928, the rule is stated as follows:

> ''The doctrine of apparent authority can be invoked only by *those who had knowledge* that the agent had been permitted to exercise such authority *and who act in reliance thereon.''*
>
> (217 N. W. 348)

In

Merchants Nat. Bank v. Nichols & Shepard Co., 223 Ill. 41, 79 N. E. 38,

decided in the Supreme Court of Illinois in 1906, the court states the rule as follows:

> ''A party dealing with an agent must prove that the facts giving color to the agency were known to him when he dealt with the agent. *If he has no knowledge of such facts, he does not act in reliance upon them and is in no position to claim anything on account of them.''*

And the rule is stated in

''Principal and Agent'', 21 Ruling Case Law 856, Sec. 34,

in the following language:

> ''* * * A party dealing with an agent must prove that the facts giving color to the agency were

known to him when he dealt with the agent. *If he has no knowledge of such facts, he does not act in reliance upon them, and is in no position to claim anything on account of them.*''

In

Maryland Casualty Co. v. City of Cincinnati, supra (291 Fed. 825),

the court states the rule thus:

''The act in question was one of importance. It involved, upon the bank's interpretation of it, the waiving of substantial rights on the part of the casualty company. *It was not an act necessarily incident to the making of the bond which was authorized, but, on the contrary, was in derogation of the rights which would flow from the specifically authorized contract.* The evidence does not show that Fredriks had specific authority, either general or special, to enter such waiver. There is not sufficient evidence to warrant the conclusion of a previous general holding out of such authority by the casualty company. Fredriks had signed such consents as to the bonds of other contractors, *but the evidence does not show that the casualty company had knowledge of this.* The evidence certainly does not show that it was so generally done by Fredriks and acquiesced in by the casualty company as to amount to a holding out of such authority to the general public; *nor does the evidence show that the bank had knowledge of such previous acts of consent by Fredriks or that it relied thereon. The evidence shows no other prior act such as would warrant a reasonably prudent business man in believing that Fredriks had such authority at the time this consent was given.* The acquiescence of the casualty company in the subsequent acts of Fredriks could not amount to a holding out or representation of authority for this act. They may be looked to, however, in determining whether

> Fredriks had actual authority; but because the casualty company gave Fredriks a free hand to deal with the situation after trouble arose, when it necessarily had to be represented on the ground by someone, does not impel the conclusion that he had authority to enter a waiver of his company's right to subrogation before the trouble arose and at the time when all was proceeding satisfactorily. The court may not infer a probability of authority from the fact that Fredriks did sign the paper. *There must be some act or acquiescence with knowledge brought home to his principal sufficient to warrant a reasonable inference of authority before it can be found.* Upon a careful scrutiny of the evidence, none is found. The matter is determined by the law concerning the burden of proof. The evidence has been examined with that rule in mind which declares that it is to be considered in the light of what it is possible for the party to produce under the circumstances. Nevertheless, upon a careful examination, I am unable to find sufficient proof of Fredriks' authority to enter this waiver to warrant me in holding that he had such authority. *It must not be lost sight of that the bank had it within its power to require evidence of authority at the time it relied upon this consent, if it did rely upon it.* Therefore it must be concluded that Fredriks' consent was without authority here shown, and cannot be considered binding upon the casualty company; and so that company, upon the bill, must prevail."
>
> (291 Fed. 828-9)

Throughout the present case counsel for appellee made much ado over the fact that Hickman described himself as "Intermountain Manager" in introducing himself to prospective patrons, and that he used that title on his office door, on his business cards and envelopes,

on the souvenir eyeshades which he distributed, and on the newspaper publication of appellant's annual statement. No evidence was introduced to show the meaning of the term, or to show that an "Intermountain Manager" possesses the same powers as a "general agent".

In

Punton v. United States Life Ins. Co., 245 S. W. 1080,

decided in the Kansas City Court of Appeals, Missouri, in 1922, the plaintiff sought to prove ostensible agency by evidence that defendant company styled the agent with whom plaintiff dealt, as "manager"; and also by evidence as to the sign on the agent's office door. The court held that such evidence was not sufficient to impose liability on defendant company for an unauthorized act of the agent. The language of the court is as follows:

> "There is no evidence in the record that defendant held out the local agent as a general agent or as having power to make contracts of insurance or altering policies issued by it by inserting slips such as was pasted upon this policy. Plaintiff testified that he saw on the office door of the local agent words to the effect that he was a 'regular' agent. There was no evidence tending to show what kind of an agent a regular agent of the insurance company is. We cannot say as a matter of law that such designation is equivalent to that of a 'general agent.' There is no evidence that the defendant knew of the wording on the door of the agent's office. There is evidence that the local medical examiner addressed a letter to the local agent as 'general agent', but whether this constituted a holding out on the part of the company that the local agent was a general

agent is at least a very serious question in the absence of a showing of the authority of the local medical examiner. However, there was no evidence that plaintiff saw or knew anything about this letter. Certainly there was no holding out to the plaintiff in connection with the letter. *There was also evidence that defendant styled its local agent as 'manager'. Whether plaintiff knew of this is not in evidence. A title of this kind does not of itself show that the local agent was a general agent.''*

(245 S. W. 1081)

In

Continental Ins. Co. v. Schulman, 205 S. W. 315, decided in the Supreme Court of Tennessee in 1918, the court held that the principal was not bound by the unauthorized act of a *general agent* in making a parol contract of insurance where the claim of ostensible authority to do so was based on facts not known to the principal. The language of the court is as follows:

"But it is argued that Cowden & Co. from time to time told Schulman that he was insured when he made demands for his policy. This is beside the case.

"Suppose these agents did make such statements to Schulman. *The insurance company had no knowledge of the statements. Making these statements neither added to the powers of the agents, nor widened the apparent scope of their authority.*

"Statements like these may serve to render agents personally liable to the insured who has been deceived by them, but it is difficult to understand how the rights of the principal, altogether in ignorance thereof, could be affected by such asseverations, no matter how often repeated.''

(205 S. W. 318)

Under the principles announced in the authorities we have cited, and in many others of similar import, it is contended that liability for the unauthorized representations, alleged to have been made by Hickman, may not be imposed on appellant simply because Hickman gave himself the title Intermountain Manager; or because he introduced himself to prospective patrons as being such manager; or because he used business cards, envelopes and souvenir eyeshades bearing inscriptions of similar character; or because he inserted the caption, "F. L. Hickman, Intermountain Manager", on a newspaper publication that was made pursuant to a statute.

The courts have said repeatedly that the statements and declarations of the agent himself are not proof of the fact, or the extent, of his authority. By the same token the statements and declarations of strangers cannot be regarded as any better proof of the agent's power. There is not a scrap of evidence in this case to show that B. H. Robison had any connection with appellant, or had any authority to introduce Hickman to Yelland and Doutre as intermountain manager for appellant. It is obvious that Robison had no positive or direct information that Hickman was anything more than his contract makes him—a mere soliciting agent—or he would have been called as a witness at the trial. In view of the fact that counsel for appellee, and the court, too, thought there was probative value in the testimony that Robison had so introduced Hickman, one wonders why counsel did not avail himself of Robison's own testimony.

Appellee's case, as disclosed by the record, is made up of her own testimony as to the conversations between

Hickman and Louis Yelland, and a mass of incompetent and immaterial testimony, most of which is hearsay, relative to business cards, envelopes, eyeshades, captions on advertisements and a sign on an office door.

The only way in which appellant is coupled with any of this is through the circumstance that Hickman's envelopes reached the desk at appellant's home office where the mail was opened and the envelopes thrown into a waste basket—a practice which prevails in every business, both large and small—and through the additional circumstance that copies of the statutory publication of appellant's annual statement were sent by Hickman. Not a syllable of evidence shows that any of appellant's executive officers ever saw either envelope or newspaper clipping.

Not only was there no showing that appellant had any knowledge of the facts and circumstances on which appellee's case was built, but there isn't even a scintilla of evidence to show that Louis Yelland had the slightest knowledge of any of these things. It is not shown that he ever saw Hickman's business card, envelopes or eyeshades. It is not shown that he ever saw the sign on Hickman's door; or that he ever saw the newspaper containing appellant's annual statement. All he knew about Hickman's power and authority to act for appellant was what Hickman told him. No less a person than appellee herself vouches for this fact (Tr. 67).

There is, therefore, no foundation on which to base an ostensible agency; and Hickman's contract with appellant shows that he had no actual authority to do anything more than solicit insurance, and forward such applications as

he received to the home office for approval or disapproval there.

It is therefore contended that the District Court erred:

(a) In admitting Mrs. Yelland's testimony that Hickman stated that he was intermountain manager, and that he had authority to state that the policy for which Yelland applied would become effective on giving a note, the same as if cash were paid (Tr. 60: VI; 65: XII).

(b) In denying appellant's several motions to strike Mrs. Yelland's testimony (Tr. 61: VII; 65-6: XIII; 69: XV; 134-5, 141: LXIX; 139, 141: LXXVII; 247-8: CXI).

(c) In admitting Hickman's testimony that he acted as intermountain manager for five years (Tr. 88: XXV; 170: LXXXII); that he called on Doutre for the purpose of selling him insurance (Tr. 94-5: XXX); that he was introduced to Doutre as intermountain manager (Tr. 97-8: XXXIII); that he interviewed Arthur Yelland, at about the same time he called on Louis Yelland (Tr. 101-2, 179-80: XXXVII); that he introduced himself as intermountain manager to Arthur Yelland (Tr. 102, 180: XXXVIII); that he selected Dr. Rand as medical examiner, and that Dr. Rand had made medical examinations in that vicinity for several years (Tr. 105-6, 183-4: XL); that his contract made him intermountain manager (Tr. 169: LXXXI); that when he was introduced to Louis Yelland and Steven Doutre by Robison he was described as intermountain manager (Tr. 176-7: LXXXV, LXXXVI); that appellant paid the rent for his office in Salt Lake City (Tr. 89: XXVI); that he sent Doutre a letter in his business envelope (Tr. 98-9: XXXIV); and that copies of the pub-

lished annual statement were sent to appellant's home office (Tr. 99, 177, 178: XXXV).

(d) In admitting Hickman's testimony relative to the sign on his office door (Tr. 90, 172-3: XXVII); relative to the captions on the published annual statments of appellant's business (Tr. 92, 174-5: XXVIII); relative to his business envelope (Tr. 93, 175-6: XXIX); relative to the business card used by him (Tr. 100-1, 178-9: XXXVI).

(e) In admitting Doutre's testimony that Robison introduced Hickman as intermountain manager (Tr. 119-20: LI); that Hickman said he was "manager" (Tr. 120-1: LIII); that Hickman said that he had insured Yelland and expected to insure Robison (Tr. 123: LVII); that Hickman told Doutre that if he took out insurance, it would be effective on signing an application, giving a note for the premium, and passing the medical examination (Tr. 123-4: LVIII); that Hickman handed him a business card on which Hickman is described as intermountain manager (Tr. 121: LIV); that he had received through the mails from Hickman a business envelope bearing a similar inscription (Tr. 125: LX); that Hickman had called on him for the purpose of selling him insurance (Tr. 122: LV).

(f) In denying appellant's several motions to strike Doutre's testimony (Tr. 120: LII; 122: LVI; 124: LIX; 138-9, 141: LXXVI; 247-8: CXI).

(g) In admitting Arthur Yelland's testimony that Hickman had said he would write insurance for Arthur Yelland on the same conditions made with Louis Yelland, and that the policy would be in effect on signing an appli-

cation, giving a note for the premium, and passing the medical examination (Tr. 126-8: LXII, LXIII); that Hickman gave him a business card and eyeshade on which Hickman is described as intermountain manager (Tr. 128-9: LXIV).

(h) In denying appellant's several motions to strike Arthur Yelland's testimony (Tr. 130-1: LXV; 135-6, 141: LXXI; 138-9, 141: LXXVI; 247-8: CXI).

(i) In admitting Preston's testimony that the sign "Bankers Reserve Life Company, F. L. Hickman, Manager", *might have been* on Hickman's office door (Tr. 115, 234: CV).

(j) In admitting in evidence Section 1143 of the Insurance Laws of Utah, the certificate of the Secretary of State attached thereto, and the certified copy of the statutory publication of appellant's annual statement covering its 1926 business (Tr. 70-1, 72-4, 78-81: XVI, XX).

(k) In denying appellant's several motions to strike out said Section 1143 of the Insurance Laws of Utah (Tr. 138, 141: LXXV; 247-8: CXL).

(l) In permitting counsel for appellee to read to the jury the certified copy of the statutory publication of appellant's annual statement (Tr. 75-8: XVIII).

(m) In admitting in evidence, and permitting to be read to the jury, Hickman's business envelope (Tr. 112-3, 189: XLVI; 126: LXI; 246-7: CX).

(n) In admitting in evidence Hickman's business card and envelope attached as exhibits to the Rand, Chapin and Doutre depositions (Tr. 131: LXVI).

(o) In denying appellant's motion to strike all testimony relative to conditions in Salt Lake City, and to the sign on the door of Hickman's office there (Tr. 135, 141: LXX; 247-8: CXI; 248: CXII).

(p) In denying appellant's motion to strike all testimony relative to the caption on the statutory publication of appellant's annual statement (Tr. 248-9: CXIII).

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(4) THE DISTRICT COURT ERRED IN REFUSING TO ADMIT EVIDENCE OFFERED BY APPELLANT TO PROVE THAT HICKMAN DID NOT POSSESS AUTHORITY TO MAKE THE CONTRACT ALLEGED BY APPELLEE, AND TO PROVE THAT THERE WAS NO CONTRACT BETWEEN APPELLANT AND YELLAND.

Although the District Court permitted appellee to introduce considerable evidence as to the declarations and statements of Hickman relative to his own agency, and his habits and practices in distributing business cards and eyeshades on which he was described as appellant's intermountain manager, and admitted evidence as to the character of business stationery which he used; and also admitted, apparently as proof of Hickman's agency, the fact that Robison, who is not connected in any way with appellant company (although his name is identical with that of the company's founder), had described Hickman as being appellant's intermountain manager in introducing him to Louis Yelland and Steven Doutre, the court refused to permit appellant to rebut this showing by the testimony of persons having the best information as to the nature and extent of Hickman's authority.

It is elementary law that a defendant is entitled to introduce proof to rebut any matter alleged and proved by the plaintiff.

On this point, in

Moore v. Switzer, supra (239 Pac. 874),

the Supreme Court of Colorado said:

> "The court was also in error in excluding the evidence for defendant of what the express authority of the agent was, since it tended to refute the conclusion of actual authority sought to be drawn from the evidence. The effect of this ruling was that plaintiff might prove actual authority, but defendant might not disprove it."
>
> (239 Pac. 876)

And, in

Jos. Schlitz Brewing Co. v. Grimmon, supra (81 Pac. 43),

the Supreme Court of Nevada made the following statement:

> "* * * While the evidence was being placed in plaintiff's case in chief, it was sought to prove by the depositions of the officers of the company that Shape had no authority to sell or waive its right to the cooperage. The witnesses were asked whether he had been authorized, empowered, or instructed to dispose of any cooperage. Objection was made, and sustained on the grounds that whether he was authorized was a conclusion, and that the witnesses could testify only to the terms of the appointment. This is a correct doctrine in cases where it is sought to prove power or authority in an agent. If in writing, the instrument should be produced, or its loss shown; and, if verbal, the language should be stated to the best of the witness' recollection. *But*

when, as here, it is sought to prove a negative, and that no authority was given, such objection cannot prevail or apply, for it is beyond reason and impossible for a witness to state the terms of an appointment when none exist; and, although the word 'authority' is too much in the nature of conclusion to use in a question to a witness, it is at least proper for him to testify that there was no instruction or nothing said or written in regard to the matter by the party claimed to be the principal to the party claimed to be the agent.''

(81 Pac. 45)

Such was the ruling of the Supreme Court of Nevada in a case which was similar to the present one in the respect that the question before the court was not whether the agent had any power or authority at all, but whether he had the power and authority to make the particular representation or agreement in question.

It is therefore contended that the District Court erred:

(a) In refusing to permit counsel for appellant to ask Hickman who had the final say, if he knew, as to whether or not the company would accept an application (Tr. 194: LXXXXIII);

(b) In refusing to permit counsel for appellant to prove by the testimony of Preston that Hickman was neither a general agent or manager for appellant (Tr. 209-10: CI);

(c) In refusing to permit counsel for appellant to prove by the testimony of Preston that Hickman was a limiting soliciting agent (Tr. 210: CII);

(d) In refusing to permit counsel for appellant to prove by the testimony of Preston that Hickman had no

authority or power to make, alter or discharge any contract or application for insurance, or to modify any of the terms, conditions or provisions of any contract or application for insurance, for or on behalf of appellant (Tr. 210-1: CIII); and

(e) In refusing to permit counsel for appellant to prove by the testimony of Preston that the appellant's board of directors had never recognized, ratified or authorized any contract of insurance based upon any procedure other than a written application forwarded to the company's home office and passed upon there (Tr. 212-3: CIV).

In view of the fact that appellee's evidence had attempted to emphasize the fact that Yelland had given a note for the first annual premium on the policy for which he applied, it is contended that appellant had the right to introduce proof to show that it never received any benefit or advantage because, or on account, of that note.

If any such benefit or advantage had been received and retained by the company, appellant might well be held to be estopped to deny liability on the contract alleged in the amended complaint. It was appellant's right to introduce evidence to show that no such benefit or advantage was received, in order to escape the doctrine of estoppel.

It is therefore contended that the District Court erred:

(a) In refusing to permit counsel for appellant to prove by the testimony of Preston that the Yelland premium note was never paid to the company (Tr. 203: LXXXXV);

(b) In refusing to permit counsel for appellant to prove by the testimony of Preston that the company never received any proceeds from, or because of, said note (Tr. 203-5: LXXXXVI);

(c) In refusing to permit counsel for appellant to prove by the testimony of Preston that the company never received any money or premiums of any kind or character on the Yelland application (Tr. 204-5: LXXXXVII);

(d) In refusing to permit counsel for appellant to prove by the testimony of Preston that the company never received any consideration of any kind or character for, or because of, the Yelland application (Tr. 205: LXXXXVIII);

(e) In refusing to permit counsel for appellant to prove by the testimony of Preston that the Yelland application had never been accepted by appellant (Tr. 208-9: C); and

(f) In refusing to permit counsel for appellant to prove by the testimony of Preston that Yelland had never made any application to appellant for insurance, other than the application theretofore admitted in evidence (Tr. 201-2: LXXXXIV).

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(5) THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE NOT MATERIAL UNDER THE ISSUES OFFERED BY THE PLEADINGS.

The ultimate pleadings in this case presented no question other than this: Was appellant obligated to pay appellee the amount of the policy for which Louis Yelland applied, in view of the alleged representation of Hickman

that the insurance would be in full force and effect as soon as Yelland signed the application, gave a note for the first annual premium, and passed Dr. Rand's examination? Appellant's denial of liability or obligation was based on the assertion that Hickman was not authorized or empowered by appellant to make any such contract of insurance, and that delivery of the policy to Yelland in person, during his lifetime and while in good health, in accordance with the provisions of Paragraph 11 of the application, was a condition precedent to any liability in this case. The pleadings presented no issue on the point whether Yelland was financially responsible or whether he was an insurable risk. Neither did they present any issue as to the form of policy that might have been issued to Yelland on his application, if he had not died before the company took action on it.

These matters were entirely foreign to the questions raised by the ultimate pleadings in this case, and it is therefore contended that the District Court erred:

(a) In admitting the testimony given by the witness Hamer, to the effect that, in his opinion, the medical examiner's report on Yelland indicated that Yelland had passed the medical examination, and that he was a good insurance risk (Tr. 96-7: XXXI);

(b) In denying appellant's motion to strike the aforesaid testimony given by Hamer, when said motion was made at the time the testimony was introduced (Tr. 97: XXXII); when said motion was renewed at the close of plaintiff's evidence (Tr. 137, 141: LXXIII); and when

said motion was renewed at the close of all the evidence (Tr. 247-8: CXI);

(c) In admitting the testimony of the witness Chapin, that he was acquainted with Yelland's financial status (Tr. 116-7: XLVII); that if his bank would have refused to "cash" the Yelland premium note, it was not because they would not have been willing to loan Yelland that amount, or a greater amount, but because the bank did not discount insurance notes (Tr. 117-8: XLVIII); and that Yelland was "absolutely good" for the amount of the premium note (Tr. 118-9: XLIX); and

(d) In denying appellant's motion to strike the aforesaid testimony given by Chapin, when said motion was made at the time the testimony was introduced (Tr. 119: L); when said motion was renewed at the close of plaintiff's evidence (Tr. 137-8, 141: LXXIV); and when said motion was renewed at the close of all the evidence (Tr. 247-8: CXI).

It is also contended that the District Court erred in admitting other testimony not material under the issues presented by the ultimate pleadings in this case. Such testimony is the following:

(a) Mrs. Yelland's testimony that she caused demand for payment to be made on appellant (Tr. 63: X);

(b) Mrs. Yelland's testimony that such demand was made by her father-in-law (Tr. 67-8: XIV);

(c) Hickman's testimony that he interviewed Doutre with reference to writing insurance for him (Tr. 94-5: XXX);

(d) Hickman's testimony that he interviewed Arthur Yelland at about the same time he called on Louis Yelland (Tr. 101-2, 179-80: XXXVII);

(e) Hickman's testimony as to the kind of policy that would have been issued on the Yelland application (Tr. 108, 186-7: XLI);

(f) Hickman's testimony that his own policy was similar to the one for which Yelland applied (Tr. 108-9: XLII);

(g) Hickman's testimony that the policies written by appellant in Nevada and Utah were similar (Tr. 109-10, 187: XLIII);

(h) Hickman's testimony that the commuted value of the policy for which Yelland applied was $10,200 (Tr. 110, 187: XLIV);

(i) Hickman's testimony that he knew the commuted value of the various policies he wrote (Tr. 111, 188: LXXXX);

(j) Hickman's testimony as to the amount of commissions paid him by appellant in 1926, and whether this amount was shown in the report filed by appellant with the Insurance Commissioner of Utah (Tr. 171-2: LXXXIII);

(k) Hickman's testimony that he was in a position to advise sub-agents with reference to the various kinds of policies they wrote (Tr. 188: LXXXXI);

(l) Hickman's testimony that appellant had discontinued its office in Salt Lake City (Tr. 188-9: LXXXXII);

(m) Doutre's testimony that Hickman called on him for the purpose of selling him insurance (Tr. 122: LV); and

(n) Doutre's testimony that Hickman told Doutre that Hickman had insured Louis Yelland and expected to insure Robison (Tr. 123: LVII).

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(6) THE DISTRICT COURT ERRED IN REFUSING TO GIVE THE JURY CERTAIN INSTRUCTIONS REQUESTED BY APPELLANT, IN WHICH THE LAW APPLICABLE TO THE EVIDENCE ADDUCED IN THIS CASE WAS PROPERLY STATED.

Counsel for appellant requested the Court to give the jury the following instruction:

> "On signing the application for insurance in the evidence, the Louis Yelland referred to in the evidence, was bound to inform himself of the terms and restrictions therein contained, and that the nature and extent or limitations on the authority of F. L. Hickman, the alleged agent of the defendant, are to be found from all evidence before you; that if you find from the evidence that the authority of said Hickman was to procure applications for insurance and forward same to the home office of defendant company, and to receive first premiums in cash and upon issuance of policies by said home office to receive such as were sent by said home office to him and deliver them respectively to the persons entitled thereto, and you do not find that said Hickman had authority from defendant company to make, change, alter or modify the same, then the agency of said Hickman was a particular or special agency, and he

had no authority in law to waive any provision of said written application."

(Tr. 251-2, 260:CXVI)

The court refused, however, to give this instruction to the jury.

The cases heretofore cited in this brief show that the rules of law embraced in said requested instruction are well established. The only part of this instruction which is not fully covered by the cases cited, is the following: "On signing the application for insurance in the evidence, the Louis Yelland referred to in the evidence was bound to inform himself of the terms and restrictions therein contained." This matter is treated in

Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203,

decided in the United States Supreme Court in 1875. The court said:

> "That the defendant did not read the charter and by-laws, if such were the fact, was his own fault. It will not do for a man to enter into a contract and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, *if he will not read what he signs, he alone is responsible for his omission.*"
>
> (23 L. Ed. 205)

It is, therefore, contended that the court erred in refusing to give the jury this instruction (Assignment of Error CXVI).

Counsel for appellant also requested the court to give the jury the following instruction:

> "You are instructed that one dealing with an agent should ascertain the extent of his authority from the principals or from some other person, who will have a motive to tell the truth in the interests of the principal; that one dealing with an agent cannot rely upon the statement of the agent for the fact or extent of the agency nor upon assumption of authority by the agent or upon mere presumption that such person is an agent or upon presumption as to the extent of his agency."
>
> (Tr. 252, 260: CXVII)

The court refused, however, to give this instruction to the jury.

The part of this requested instruction which states that one dealing with an agent may not rely on the agent's statements as to the fact or extent of his agency is justified by the cases heretofore cited in this brief. The part which states "you are instructed that one dealing with an agent should ascertain the extent of his authority from the principals or from some other person, who will have a motive to tell the truth in the interests of the principal" is based on the case of

> *Jonathan Mills Mfg. Co. v. Whitehurst,* 72 Fed. 496,

decided in the Circuit Court of Appeals for the Sixth Circuit in 1896, where the court said:

> "It is well established that one who has reason to believe that another is offering property for sale, which he holds either as trustee *or agent,* for a third person, cannot become a bona fide purchaser of the property for value *by reliance on the statements of the suspected trustee or agent,* either as to his authority, or as to his beneficial ownership of the thing sold. *In such case, inquiry must be made of someone other than the agent or trustee—of someone who will have a motive to tell the truth, in the interest of the cestui que trust or principal.*"
>
> (72 Fed. 502)

In view of the fact that Hickman was asserting authority to bind appellant by an oral contract of insurance—an unusual and improbable authority—the present case falls squarely within the rule thus stated by the United States Circuit Court of Appeals.

It is, therefore, contended that the court erred in refusing to give the jury this instruction (Assignment of Error CXVII).

Counsel for appellant also requested the court to give the jury the following instruction:

> "Unless you find from the preponderance of the evidence that F. L. Hickman, the person whose name is signed to the application for insurance Exhibit.....in the evidence was authorized, or held out as being so authorized on November 20, 1926, by defendant company, to make contracts of insurance with persons desiring same, to agree with said persons on the terms and conditions of such contracts, and the effective date and dates thereof, to

waive or change the terms and conditions and character of the payment of the first premium on such policies, viz., to accept in lieu of cash in full a note payable to himself due approximately seven and one-half months after the date of the application and the date of the note,—then it is your duty to return a verdict for the defendant.

"And the court states to you that the facts, if they or either thereof be facts, that said Hickman sometimes used stationery on which was printed the name of defendant company, and said Hickman's name followed by the words 'Intermountain Manager', are not of themselves sufficient to justify the conclusion or finding that said Hickman was a general agent or manager of defendant company or any of its business, or that he was clothed with any such authority as is mentioned in the first paragraph of this instruction."

(Tr. 252-3, 260: CXVIII)

The court refused, however, to give this instruction to the jury.

All of the elements of this instruction are covered by the cases which have been set forth in this brief.

It is, therefore, contended that the court erred in refusing to give the jury this instruction (Assignment of Error CXVIII).

Counsel for appellant also requested the court to give the jury the following instruction:

"You are instructed that generally a general agent or manager of an insurance company is one who is

authorized to accept insurance risks, agree upon and settle the terms of the insurance contracts, issue policies by filling out blank instruments furnished him for that purpose and to renew policies already issued.

"That generally a person who procures applications for insurance forwards them to some officer or committee by whom they are accepted and policies are issued, or the application rejected,—and collects the premiums and delivers the policies when they are issued, is a soliciting or special and not a general agent or manager."

(Tr. 253, 260: CXIX)

The court refused, however, to give this instruction to the jury.

All of the elements of this instruction are also covered by the authorities heretofore set forth in this brief.

It is, therefore, contended that the court erred in refusing to give the jury this instruction (Assignment of Error CXIX).

Counsel for appellant also requested the court to give the jury the following instruction:

"You are instructed that in law every person who undertakes to deal with an alleged agent is, by the mere fact of agency, put upon inquiry, and must discover at his peril that the act which such alleged agent proposes to do is in its nature and scope within the power and authority of such alleged agent to do; that the authority held by such agent is in its nature and extent sufficient to permit the alleged

agent to do the proposed act, and that such power and authority for its source can be traced to the will of the alleged principal.

"That this rule is particularly applicable where one is dealing with an alleged agent whose authority he knows, or in the exercise of ordinary prudence should know, is special; or where one is dealing with an alleged agent in his first transaction with such person; or where the circumstances connected with the matter do or should in common prudence, put one on inquiry; or where it appears from the circumstances of the particular matter that the interests of the alleged agent and alleged principal are adverse; or that the authority assumed or represented is of an unusual, improbable, or extraordinary nature."

(Tr. 253-4, 260: CXX)

The court refused, however, to give this instruction to the jury.

Nearly all of the elements of this instruction are covered by cases already cited in this brief; the remaining elements are covered by the following statement taken from

"*Agency*", 2 Corpus Juris 562-3, Sec. 204:

"It follows from the above rules that as a general rule every person who undertakes to deal with an alleged agent is, by the mere fact of the agency, put upon inquiry, and must discover at his peril that it is in its nature and extent sufficient to permit the agent to do the proposed act, and that its source can be traced to the will of the alleged principal, particularly where he is dealing with an agent whose authority he knows to be special, *or where it is his first transaction with the agent, or the circumstances connected with the agency are such as should put him*

> *on inquiry,* as where it appears from the circumstances of the particular business that the interests of the agent and principal are necessarily adverse, *or that the authority is of an unusual, improbable or extraordinary nature.''*

In

Miles F. Bixler Co. v. Riney, 7 S. W. (2d) 396,

decided in the Springfield Court of Appeals, Missouri, in 1928, the court quotes and approves the above passage from *Corpus Juris,* and then applies it to the facts of the case before the court, in the following language:

> ''There is no claim that defendant had ever before had any transaction of any nature with plaintiff's travelling salesman or with plaintiff. Defendant testified that he never heard of plaintiff company 'until the salesman came in that day'. That the contract claimed by defendant is unusual and out of the ordinary will be conceded. We think, that under the facts, plaintiff's instruction No. 6 should have been given.''
>
> (7 S. W. (2d) 398)

The instruction referred to by the court is more severe than the one requested by counsel for appellant in this case. It read as follows:

> ''The court instructs the jury that before you can find for defendant on the theory of a verbal contract, you must find from the evidence that the salesman had authority from the Miles F. Bixler Company to make such a contract, *and you are further instructed that there is no testimony in this case to warrant such finding.''*
>
> (7 S. W. (2d) 397)

Attention is called to the fact that Mrs. Yelland testified that when Hickman visited the Yelland ranch on November 18th, 1926, he was *introduced* by Robison (Tr. 58); and that she met Hickman for the first time on that same occasion (Tr. 57-8). These facts bring the present case within the provisions of the rule thus stated in Corpus Juris.

It is, therefore, contended that the court erred in refusing to give the jury this instruction (Assignment of Error CXX).

Counsel for appellant also requested the court to give the jury the following instruction:

> "The court instructs you that if a person deals with one considered by him to be an agent and makes no inquiry as to the authority of such considered agent, from the principal or some third person having a motive to tell the truth in the interests of the principal, but on the contrary such person so dealing chooses to rely on the agent's statements, such person is chargeable with knowledge of the agent's authority, whatever it in fact be, and his actual ignorance of the extent or limitation of such authority is no excuse and the fault, if any, cannot be thrown upon the principal who never authorized the act or contract being considered."
>
> (Tr. 254-5, 260: CXXI).

The court refused, however, to give this instruction to the jury.

All of the elements of this instruction are supported by well established rules of law, most of which have been treated in the pages of this brief.

It is, therefore, contended, that the court erred in refusing to give the jury this instruction (Assignment of Error CXXI).

Counsel for appellant also requested the court to give the jury the following instruction:

> "The court instructs you that on signing the written application for insurance in evidence, the said Louis Yelland was bound to inform himself of the terms, conditions and contents thereof and the restrictions therein contained, and that the nature and extent or limitations of the authority of the alleged agent, F. L. Hickman, are to be found from all the evidence before you; that unless you find from a preponderance of all said evidence that said F. L. Hickman had the authority to act in the name of and in the place and stead of defendant company and determine for said company whether or not it would waive the written provisions of said written application, and particularly those providing,
>
> '11. It is agreed on behalf of myself and of any person or persons who may have or claim any interest in any policy that may be issued under this application as follows:
>
> '(2) That under no circumstances shall the insurance hereby applied for be in force until payment in cash of the first premium, and delivery of the policy to the applicant in person, during his lifetime and while in good health. * * *
>
> then it is your duty to return a verdict herein for the defendant.
>
> "And in this connection the court states that the facts, if they are or either thereof be facts, that at times the said Hickman used stationery or cards on which was printed defendant company's name, his own name and after his name the words 'Intermoun-

> tain Manager', and that said Hickman in conversations referred to himself as intermountain manager for defendant company, if he did, and that there was painted on the door of an office in Salt Lake City the name of defendant company followed by the name of said Hickman and the words 'Intermountain Manager' if such was the fact, and that certain publication was made in the Salt Lake Tribune of defendant's financial condition, if it was, and that with such publication appeared the name of said Hickman and the words 'Intermountain Manager', if it be the fact, are not of themselves sufficient to justify the conclusion that said Hickman had the authority to make the waivers in this instruction referred to.''
>
> (Tr. 255-6, 260: CXXII)

The court refused, however, to give this instruction to the jury.

All of the elements of this instruction are covered by the authorities cited in this brief. If the instruction is defective in any particular, it is because it is more favorable to appellee than the facts of the case would warrant. It permits the jury to consider whether the evidence is sufficient to show that Hickman had authority to waive the conditions set down in paragraph 11 of the application. Under the parol evidence rule and its application to this case, it is quite unimportant whether Hickman had authority to waive the provisions of this part of the application.

It is, therefore, contended that the court erred in refusing to give the jury this instruction (Assignment of Error CXXII).

Counsel for appellant also requested the court to give the jury the following instruction:

> "You are instructed that in this action the plaintiff seeks to recover upon an oral contract of insurance. By oral contract is meant a contract which is wholly oral or which is partly written and partly oral. It is incumbent upon the plaintiff in this action to establish by a preponderance of the evidence that such contract was entered into on behalf of the defendant by some officer or agent authorized to execute a contract of such character, because corporations can only act through their officers or agents.
>
> "You are not to presume an agency, but agency must be proven by a preponderance of the evidence, and the acts or declarations of an agent are not of themselves sufficient in law to establish or prove agency.
>
> "In order for the plaintiff to prevail you must find from a preponderance of the evidence that Mr. Hickman was authorized as an agent, orally to enter into a contract for insurance, or that he was a manager of the defendant. As an agent he must have acted within the scope of his authority as such, and you must find if he did enter into such contract that he was specifically authorized to do so by the defendant. A manager of a corporation is one who has the general control of the affairs of the corporation and who has knowledge of all its business and property, and who can in emergencies act on his own responsibility. The very term implies a general supervision of the affairs of the corporation in all its departments. I instruct you that there is no evidence here that Mr. Hickman was such a manager of the business or affairs of the company, and you must, therefore, in order to find for the plaintiff, find that Mr. Hickman entered into the contract and further that in so doing he acted within the scope of his authority as an agent of defendant."
>
> (Tr. 256-7, 260: CXXIII)

The court refused, however, to give this instruction to the jury.

All of the elements of this instruction are supported by well established rules of law, most of which have been dealt with in this brief. If there is any defect in the instruction it is that it is more favorable to appellee than the facts in the case would warrant, since it allows the jury to determine from the evidence admitted whether Hickman acted within the scope of his authority as an agent for appellant in making the alleged oral agreement that Yelland's insurance would be effective as soon as he signed the application, gave a note for the premium, and passed Dr. Rand's medical examination. Hickman's contract is in evidence and shows that he had no such actual authority. The only facts and circumstances in evidence which tend even slightly to show apparent or ostensible agency are insufficient in law to furnish a basis for any such finding, because there is not one single fact or circumstance testified to by *any* witness in this case which was shown to be known both to Yelland and appellant, and shown to have been *relied on* by Yelland in his dealings with Hickman.

It is, therefore, contended that the court erred in refusing to give the jury this instruction (Assignment of Error CXXIII).

Counsel for appellant also requested the court to give the jury the following instruction:

> "You are instructed that a corporation can act only through its agents. The power of an agent may

be general or it may be special. It is general when the agent is empowered to do a particular thing or many things in a way necessary or proper to accomplish the end. In this case, however, there is no general agency which has been established by the proof. An agency is special when the agent is empowered to do a particular thing or many things in a limited way. In this case there is no evidence of a general agency or that Mr. Hickman was ever appointed a general agent of the corporation. It is, therefore, for the jury to determine from a preponderance of the evidence whether or not the defendant, acting through Mr. Hickman as a special agent, executed or made the contract in question. You must further find, if Mr. Hickman acted as an agent, that he had the specific authority to make the contract in question. In other words, if you find from a preponderance of the evidence that Mr. Hickman was a special agent of the defendant corporation, then you must also find from the preponderance of the evidence that he was specifically authorized to execute the contract here involved, otherwise the defendant is not bound and your verdict must be for the defendant, because a special agent must act within the scope of his authority because it is a rule of law that a person dealing with one known to be or shown to be a special agent or claiming to be such, is bound at his peril to see that the agent has the authority to bind the principal in the transaction. That in such situation one may not rely upon the agent's declarations, if any, as to his authority or the extent thereof, but must make other investigation thereof or assume the risk of not so doing.''

(Tr. 257-9, 260: CXXIV).

The court refused, however, to give this instruction to the jury.

All of the elements of this instruction are supported by well established rules of law, most of which are covered by the authorities cited in this brief.

It is, therefore, contended that the court erred in refusing to give the jury this instruction (Assignment of Error CXXIV).

Counsel for appellant also requested the court to give the jury the following instruction:

> "You are instructed that the management and control of the business and affairs of a corporation are committed by law to a board of directors or trustees thereof; that any other person assuming or appearing to act for a corporation must in fact derive his power and authority from such board; that a manager of defendant, if any, must have derived his appointment and authority from the board of directors of defendant, directly or indirectly.
>
> That should you find from a preponderance of the evidence that the said F. L. Hickman was in fact a manager of defendant, you are not entitled to find for plaintiff unless and until you find from a preponderance of the evidence other facts, and among them that the contract in controversy was a usual and ordinary agreement for defendant to make, for the law is that a manager of a corporation has no authority arising from the mere fact of management, if any, to make unusual and extraordinary contracts for a corporation, nor is such manager, if any, authorized from such mere management, if any, to act in an unusual and extraordinary manner and thereby bind the corporation."
>
> (Tr. 259, 260: CXXV)

The court refused, however, to give this instruction to the jury.

All of the elements of this instruction are supported by well recognized rules of law applicable to corporations and their agents.

It is, therefore, contended that the court erred in refusing to give the jury this instruction (Assignment of Error CXXV).

Counsel for appellant also requested the court to give the jury the following instruction:

> "You are instructed that to constitute one as a manager of a corporation he must be appointed, designated and authorized to transact and manage one or more distinct branches of business which may be and is carried on by the corporation in the state where the act, if any, under investigation was done; one who stands in the shoes of the corporation in relation to the particular business, if any, managed, controlled and conducted by him for the corporation; such person, if any, must be one in fact having a representative capacity and authority derived from the board of directors of a corporation, and neither such capacity or such authority, if any or either, can be created by construction or implication contrary to the intention of the parties."
>
> (Tr. 259-60, 260: CXXVI)

The court refused, however, to give this instruction to the jury.

All of the elements of this instruction are supported by well recognized rules of law applicable to corporations and their agents.

It is, therefore, contended that the court erred in refusing to give the jury this instruction (Assignment of Error CXXVI).

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(7) THE DISTRICT COURT ERRED IN GIVING THE JURY INSTRUCTIONS, REQUESTED BY APPELLEE, IN WHICH THE LAW APPLICABLE TO THE EVIDENCE ADDUCED IN THIS CASE WAS INCORRECTLY STATED.

The court instructed the jury, at the request of counsel for appellee, and over appellant's objection, as follows:

> "The designation of manager implies general powers, and is synonymous with the term of general agent, so far as ostensible powers and authority are concerned."
>
> (Tr. 262, 272-3, 275: CXXVII)

This instruction does not correctly state the law.

In

> *Punton v. United States Life Ins. Co.,* supra (245 S. W. 1080),

it was squarely held that the designation "manager", applied to a life insurance agent, was not synonymous with the term "general agent"; and the court refused to accept evidence of such designation as proof that the agent had ostensible power or authority to bind his principal by acts which were in fact unauthorized.

It is, therefore, contended that the court erred in giving this instruction to the jury (Assignment of Error CXXVII).

The court also instructed the jury, at the request of counsel for appellee, and over appellant's objection, as follows:

> "You are instructed in this case that no limitations upon the authority of the agent Hickman, contained in the contract made between the Bankers Reserve Life Company and Hickman, are binding upon the plaintiff or her husband, Louis A. Yelland, because it was a secret agreement between Hickman and the said defendant company, and Yelland did not know of any of its terms and limitations, and therefore was not bound by them."
>
> (Tr. 262, 273, 275: CXXVIII)

This instruction was improper because it does not correctly state the facts in the case, and does not correctly state the law. There was no evidence introduced to show that the contract between Hickman and appellant was "a secret agreement". On the contrary, Hickman testified that his contract was not "necessarily" secret, although it was held in confidence between them (Tr. 86).

This instruction incorrectly stated the law for the reason that it ignored the well established rule that one who deals with an agent must inquire as to both the fact and extent of his agency, and must use reasonable diligence to ascertain the limitations on the agent's power and authority.

It is, therefore, contended that the court erred in giving this instruction to the jury (Assignment of Error CXXVIII).

The court also instructed the jury, at the request of counsel for appellee, and over appellant's objection, as follows:

> "I think possibly I may be of some assistance to the jury in calling your attention to the fact that in this case the issues as raised by the pleadings present the question of what is referred to as an oral, or a partially oral and partially written contract; and that the main questions of fact to be determined here are, first, as to whether a contract such as is alleged in the complaint was ever made, and, second, if so made, was it made by one representing the defendant, having authority, express or implied authority, to enter into such a contract?"
>
> (Tr. 261-2, 273-4, 275: CXXIX)

This instruction incorrectly states the law for the reason that it ignores the parol evidence rule, and particularly that part of it which prohibits the use of parol evidence to contradict or vary the written part of a contract, partly oral and partly in writing.

Said instruction is also improper because it submits to the consideration of the jury the question whether Hickman had express or implied authority to bind appellant by the alleged agreement that the Yelland insurance would be effective as soon as Yelland signed the application, etc., when there is no competent or material evidence in the record to show that Hickman was anything other than a mere soliciting agent.

It is, therefore, contended that the court erred in giving this instruction to the jury (Assignment of Error CXXIX).

The court also instructed the jury, at the request of counsel for appellee, and over appellant's objection, as follows:

> "A district manager, embracing in the scope of his territory the States of Utah, Nevada and Southern Idaho, clothed with the power to solicit insurance, receive applications, forward them to the company, receive and deliver the policies and collect the premiums, is in effect a general agent, and as such has power to waive a condition in the application."
>
> (Tr. 262, 274, 275: CXXX)

This instruction incorrectly states the law.

In

Mechem on Agency (2d Edition), Sec. 1050, supra, the author classifies insurance agents and describes the powers and authority which they enjoy. He makes the following statement, "The soliciting agent, often called a special agent, usually of a life insurance company, is an agent who usually has no authority to make a binding contract, *but who merely solicits applications for insurance and forwards them to be passed upon at the office of his company.* In addition, he often countersigns the policy if issued, *delivers it and collects the premium.* Of such agents there are also two kinds—the general and the local, bearing the same relation to each other as the corresponding issuing agents."

It thus appears that the powers of a soliciting agent are exactly the powers which this instruction says are the tests of general agency.

It is, therefore, contended that the court erred in giving this instruction to the jury (Assignment of Error CXXX).

The court also instructed the jury, at the request of counsel for appellee, and over appellant's objection, as follows:

> "You are instructed that if you find from the evidence in the case that at the time, to-wit, on the 20th day of November, 1926, F. L. Hickman took Louis A. Yelland's application for insurance, that he represented to said Yelland that he was the intermountain manager of The Bankers Reserve Life Company, and the said Yelland believed that the said Hickman was the intermountain manager of said defendant company, and the said defendant company had before and at said time held the said Hickman out to the world as its intermountain manager, having authority to represent it in the States of Nevada, Utah and Southern Idaho, and that the said Hickman at the time of signing said application represented to and agreed with the said Yelland that his contract for insurance with the said defendant company would go into effect as soon as Yelland successfully passed the medical examination of Dr. M. J. Rand of Ely, Nevada, and said Hickman, as said intermountain manager, also agreed with said Yelland to accept his, Yelland's promissory note for $239.60, payment for the first premium on said contract of insurance, and did then and there accept from said Yelland the said promissory note for said first year's premium, and the said Yelland thereafter, to-wit, on November 26, 1926, did successfully pass the medical examination of said Dr. M. J. Rand, and was then and there declared by said Rand a good risk, and that the said Yelland thereafter, to-wit, on November 28, 1926,

> died from accidental injuries received the previous day, your verdict should be for the plaintiff, Marion E. Yelland, in the sum of $20,400.00, with interest thereon at 7 per cent. per annum to date, less the promissory note of $239.60, with interest thereon at 8 per cent. per annum from November 20, 1926 to date."
>
> (Tr. 270-1, 274-5, 275: CXXXI)

This instruction incorrectly states the law, for the reason that it ignores both the parol evidence rule and the rule that Yelland was required to exercise ordinary diligence and reasonable prudence in investigating the powers and authority possessed by Hickman, instead of relying on Hickman's bare word that he was intermountain manager, and that he had authority to make the agreement on which this case is based.

In this connection, it should be observed that despite the array of testimony that was introduced relative to business cards, envelopes and eyeshades, the sign on Hickman's office door, and the caption on the newspaper publication of appellant's annual statement, not one of all of these things was shown to have been known to Yelland. In other words, at the time Yelland had his dealings with Hickman, he knew absolutely nothing about Hickman's authority except what Hickman himself stated; and nothing whatever of the cards, envelopes and eyeshades which Hickman had been using, of the sign on Hickman's office door, or of the caption on those published statements.

It is, therefore, contended that the court erred in giving this instruction to the jury (Assignment of Error CXXXI).

In the light of the rules of law laid down in the cases and authorities cited in this brief, it is submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

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Dated: April 21, 1930.